(23,922)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 287.

THE PENNSYLVANIA RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

MITCHELL COAL & COKE COMPANY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF PENNSYLVANIA.

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1 UNITED STATES OF AMERICA, ss:

The President of the United States of America to the Honorable the Judges of the Supreme Court of Pennsylvania, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court of Pennsylvania before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between The Pennsylvania Railroad Company, Appellant, and Mitchell Coal & Coke Company, Appellee, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held
2 under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission; a manifest error hath happened to the great damage of the said The Pennsylvania Railroad Company as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the first day of July, in the year of our Lord one thousand nine hundred and thirteen.

[Seal of the District Court of the United States, E. D. Penn.]

W. W. CRAIG,
Clerk District Court of the United States,
Eastern District of Pennsylvania.

Allowed by—

D. NEWLIN FELL,
Chief Justice of the Supreme Court of the
State of Pennsylvania.

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3 Know all men by these presents, That we, The Pennsylvania Railroad Company, as principal, and The Title Guaranty and Surety Company, as sureties, are held and firmly bound unto The Mitchell Coal and Coke Company, in the full and just sum of Forty-five thousand (45,000) dollars, to be paid to the said Mitchell Coal and Coke Company, its certain attorney, executors, administrators, or assigns: to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals and dated this first day of July, in the year of our Lord one thousand nine hundred and thirteen.

Whereas, lately at a session of the Supreme Court of Pennsylvania, in a suit depending in said Court, between The Pennsylvania Railroad Company, appellant, and the Mitchell Coal and Coke Company, appellee, a judgment was rendered against the said The Pennsylvania Railroad Company, and the said The Pennsylvania Railroad Company, having obtained a writ of error and filed a copy thereof in the Clerk's Office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said Mitchell Coal and Coke Company, citing and admonishing it to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date thereof.

Now, the condition of the above is such, That if the said The Pennsylvania Railroad Company shall prosecute said writ of error to effect, and answer all damages and costs if it shall fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

4 THE PENNSYLVANIA RAILROAD COMPANY,
By GEO. D. DIXON, [SEAL.]
Vice President.

Sealed and delivered in presence of—
JOS. RICHARDSON, as to G. D. D.
GEO. F. NORTON, as to L. N.

Attest:
LEWIS NEILSON,
Secretary.

THE TITLE GUARANTY & SURETY COMPANY,
By HARRIS J. LATTA,
Resident Vice President.

Approved by
D. NEWLIN FELL,
Chief Justice Supreme Court of Pennsylvania.

Attest:
WILLIAM RARICH,
Resident Assistant Secretary.

5 UNITED STATES OF AMERICA, *ss:*

To Mitchell Coal & Coke Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the Supreme Court of Pennsylvania, wherein The Pennsylvania Railroad Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable D. Newlin Fell, Chief Justice of the Supreme Court of Pennsylvania, this first day of July, in the year of our Lord one thousand nine hundred and thirteen.

[Seal of the Supreme Court of Pennsylvania.]

D. NEWLIN FELL,
Chief Justice of the Supreme Court of Pennsylvania.

On this third day of July, in the year of our Lord one thousand nine hundred and thirteen, personally appeared before me, the subscriber, C. Voorhees Honeyman, and makes oath that he delivered a true copy of the within citation to Joseph Gilfillan, Esq., at his office, 1100 West End Trust Building, Philadelphia, at 9.30 a. m., July 3, 1913.

C. VOORHEES HONEYMAN.

Sworn to and subscribed the 3" day of July, A. D. 1913.

[Seal Henry E. Cain, Notary Public, Philadelphia, Pa.]

HENRY E. CAIN,
Notary Public.

Commission expires February 21, 1915.

6 In the Supreme Court of Pennsylvania, Eastern District.

January Term, 1913.

No. 104.

MITCHELL COAL & COKE COMPANY
vs.
THE PENNSYLVANIA RAILROAD COMPANY.

To the Honorable D. Newlin Fell, Chief Justice of the Supreme Court of Pennsylvania:

The Pennsylvania Railroad Company, the appellant in the above entitled action, respectfully shows:

The plaintiff in the action had been a shipper of coal in the period

embraced therein over the defendant's railroad, and the present action was brought to recover damages sustained because of the exaction, as alleged, by the defendant of discriminatory freight rates on these shipments, the plaintiff's allegation being that it had been charged thereon a higher rate of freight than had other shippers who, it was claimed, were not entitled to the benefit of lower rates.

Included in the shipments embraced in the action were certain shipments made from the plaintiff's mines, which were located in the State of Pennsylvania, to Greenwich, Philadelphia, in the same State, which were transported thence by water to points outside the Capes of the Delaware. These shipments moved or were transported under rates of freight established by your petitioner which were applicable only to shipments the ultimate destinations of which were points beyond or outside the Capes of the Delaware, and your petitioner's charges for transporting such coal to Greenwich were stated in the circulars by which such rates were established and put in force as the rail proportions of through rates via Greenwich to
7 points beyond.

Your petitioner contended that these shipments, because of the ultimate destination thereof, were interstate in character, and that the plaintiff consequently was entitled to assert no cause of action in respect to the same in the pending action or before a State Court, for the reason that if the plaintiff had been charge- discriminatory rates thereon, such action upon the part of your petitioner violated Section 2 of the Acts of Congress, known as the "Interstate Commerce Acts," and that actions for violation of the provisions thereof were exclusively cognizable in the Federal tribunals designated therein as those in which such actions could be maintained, viz., either the Commission created by said Acts, known as the "Interstate Commerce Commission," or the Federal Courts.

This contention was overruled by the Court below, and such action on its part has been approved and affirmed by the Supreme Court of Pennsylvania, and the plaintiff in the action has thus secured a final judgment in its favor for an amount which includes the damages which it claimed it had sustained because of the charges paid by it for the carriage by your petitioner of the coal to Greenwich under the circumstances aforesaid.

As a result of the overruling of your petitioner's contention in this respect a final judgment has been entered against it in a case in which the decisions both of the lower Court and of the Supreme Court of Pennsylvania have been against a right, privilege or immunity claimed and asserted by your petitioner under the Constitution and Statutes of the United States, and in favor of an authority exercised under and pursuant to a law of the State of Pennsylvania, notwithstanding the contention of your petitioner that such authority was not properly exercisable on the ground of its repugnancy to the Constitution and laws of the United States.

8 Your petitioner, being desirous of having such final judgment reviewed by the Supreme Court of the United States, prays that a writ of error for this purpose may be allowed.

And it will ever pray, etc.

[Seal The Pennsylvania Railroad Company, Incorporated 1846.]

THE PENNSYLVANIA RAILROAD COMPANY,
By GEO. D. DIXON, *Vice President.*

Attest:
LEWIS NEILSON, *Secretary.*

STATE OF PENSYLVANIA,
County of Philadelphia, ss:

Lewis Neilson, being duly sworn, according to law, deposes and says that he is the Secretary of the Pennsylvania Railroad Company, the petitioner herein, and that the facts contained and set forth in the above and foregoing petition are true to the best of his knowledge, information and belief.

LEWIS NEILSON.

Sworn and subscribed before me this first day of July, 1913.

[Seal Henry E. Cain, Notary Public, Philadelphia, Pa.]

HENRY E. CAIN,
Notary Public.

Commission expires February 21, 1915.

[Endorsed:] No. 104. January Term, 1913. In the Supreme Court of Pennsylvania, Eastern District. Mitchell Coal & Coke Company vs. Pennsylvania Railroad Company. Petition for Allowance of Writ of Error to the Supreme Court of the United States. Francis I. Gowen.

9 In the Supreme Court of the United States, — Term, 1913.

No. —.

PENNSYLVANIA RAILROAD COMPANY, Plaintiff in Error,
vs.
MITCHELL COAL AND COKE COMPANY, Defendant in Error.

In Error to the Supreme Court of Pennsylvania.

Specifications of Error.

1. The Supreme Court of Pennsylvania erred in overruling and dismissing the following assignment of error:

"10. The Court below erred in overruling the following exception of the defendant to the Referee's supplemental report:

"'1. The Referee has erred in finding that the plaintiff is entitled to recover $3,508.70, being ten cents a ton on 35,087 tons

of coal shipped by it from its mines other than its Gallitzin mine after December 3, 1900.'"

2. The Supreme Court of Pennsylvania erred in overruling and dismissing the following assignment of error:

"11. The Court below erred in overruling the following exception of the defendant to the Referee's supplemental report:

"'2. The Referee has erred in finding that the plaintiff is entitled to recover $10,816.74, being 18 cents a ton on 60,093 tons of coal shipped by it from its Gallitzin mine between October 1, 1899, and May 1, 1901.'"

3. The Supreme Court of Pennsylvania erred in overruling and dismissing the following assignment of error:

"14. The Court below erred in overruling the following exception of the defendant to the Referee's supplemental report:

"'7. The Referee has erred in not finding and reporting that of the 35,087 tons of coal shipped by the plaintiff from its mines other than its Gallitzin mine after December 3, 1900, 13,917 tons had been shipped to Greenwich, and as it appears from the testimony that the plaintiff's shipments to Greenwich included interstate and intrastate shipments, and the plaintiff failed to show the division as between the same, no recovery could be had as to any of the Greenwich shipments.'"

4. The Supreme Court of Pennsylvania erred in overruling and dismissing the following assignment of error:

"16. The Court below erred in overruling the following exception of the defendant to the Referee's supplemental report:

"'9. The Referee has erred in not finding and reporting that of the 44,579 tons of coal shipped by the plaintiff from its Gallitzin mine between October 1, 1899, and May 1, 1901, to points or destinations to which the defendant transported shipments for either the Altoona Coal & Coke Company, the Glen White Coal & Lumber Company or the Millwood Coal & Coke Company, 37,971 tons were shipped to Greenwich, and as it appears from the testimony that the plaintiff's shipments to Greenwich included interstate and intrastate shipments, and the plaintiff failed to show the division as between the same, no recovery could be had as to any of the Greenwich shipments.'"

FRANCIS I. GOWEN,
H. W. B.,
Attorney for Plaintiff in Error.

[Endorsed:] No. —. — Term, 1913. In the Supreme Court of the United States. Pennsylvania Railroad Company, Plaintiff in Error, vs. Mitchell Coal and Coke Company, Defendant in Error. In Error to the Supreme Court of Pennsylvania. Specifications of Error. Francis I. Gowen.

11 In the Supreme Court of Pennsylvania, Eastern District, January Term, 1913.

No. 104.

MITCHELL COAL & COKE COMPANY
vs.
THE PENNSYLVANIA RAILROAD COMPANY.

Upon the representation of counsel it appearing that the Clerk of this Court will not be able to prepare and complete the Transcript of Record in this case within the time limited in the citation, it is hereby this — day of July, 1913, ordered that the time for filing said Transcript of Record in the Supreme Court of the United States be, and the same is, hereby extended until the fifteenth day of October, 1913.

D. NEWLIN FELL,

12 Court of Common Pleas No. 3 of Philadelphia County, March Term, 1905.

No. 543.

MITCHELL COAL & COKE COMPANY
v.
PENNSYLVANIA RAILROAD COMPANY, Appellant.

Plaintiff's Statement of Claim.

The plaintiff, the Mitchell Coal and Coke Company, a corporation organized and existing under the laws of the State of Pennsylvania, claims of the Defendant, The Pennsylvania Railroad Company, a corporation organized and existing under the laws of the State of Pennsylvania, the sum of ninety-three thousand nine hundred and five dollars, upon the cause of action whereof the following is a statement:

That the plaintiff at the time of the committing of the grievances hereinafter mentioned was the owner of large bodies of bituminous coal lands in the counties of Cambria and Blair, State of Pennsylvania, and at the time hereinafter mentioned was engaged in the business of mining, producing, selling, and shipping coal and coke thereon and therefrom.

That the said defendant was and is engaged in the business of common carrier within the State of Pennsylvania, having its principal office in the city of Philadelphia, in said State of Pennsylvania, and transports for hire passengers and property between points within the State of Pennsylvania.

That the plaintiff was the owner of the following bituminous coal producing properties during the following periods, viz:

(a) Gallitzin Colliery, April 1, 1897, to May 1, 1901.

(*b*) Columbia Colliery No. 4, April 1, 1897, to May 1, 1901.
(*c*) Columbia Colliery No. 7, July 20, 1899, to May 1, 1901.
(*d*) Bennington Colliery, October 30, 1899, to May 1, 1901.

All of which collieries are situated near the defendant's
13 main line of railroad west of Altoona, State of Pennsylvania.

(*e*) Hastings Colliery was owned and operated by plaintiff between April 1, 1897, and May 1, 1901. The said colliery is situated in Cambria county, west of Altoona, State of Pennsylvania, on the line of the Cambria & Clearfield Railroad Company, which is a branch road of the Pennsylvania Railroad Company, defendant, and is owned and controlled by the defendant.

(*f*) Columbia Colliery No. 6 was owned and operated by plaintiff between December 8, 1898, and May 1, 1901. The said colliery is situated in Cambria county west of Altoona on the line of the Cambria & Clearfield Railroad Company, which is a branch road of the Pennsylvania Railroad Company, defendant, and is owned and controlled by defendant.

That in the same vicinity are collieries then and ever since owned by the Altoona Coal and Coke Company, Glen White Coal and Lumber Company, Millwood Coal Company, Latrobe Coal and Coke Company, The Boliver Coal and Coke Company and other Colliery Companies.

That during the period of the ownership of its said collieries by the said plaintiff, the said Altoona Coal and Coke Company and the Glen White Coal and Lumber Company each owned a short line railroad leading from their collieries to the defendant's railroad or its branches, as well as a small locomotive which hauled the empty railroad cars from the junction of the said short lines with defendant's railroad or its branches, to the said collieries, and after said cars were loaded at said collieries, hauled them back to the said junction, where the defendant Railroad Company took the said cars to their points of destination.

The Millwood Coal Company has no short line railroad, but has a continuation of the mine tracks down to the defendant's
14 railroad or its branches, and with its own small locomotive hauls its cars, loaded with coal, down to the railroad tracks owned or controlled by defendant company, and unloads the coal out of its cars into the cars furnished by the defendant Railroad Company.

That from October 1, 1899, to May 1, 1901, the said plaintiff owned, in connection with its said Gallitzin Colliery, a short line of railroad leading from the said last mentioned colliery to the defendant's railroad or its branches, as well as a small locomotive which hauled the empty railroad cars from the junction of the said short line with the defendant's railroad or its branches, to the said colliery and then after the said colliery company had loaded the said cars, hauled them back to the said junction, from which point the defendant railroad hauled the said cars to their points of destination. This was exactly similar to what was done by the said Altoona Coal and Coke Company and the Glen White Coal and Lumber Company

on their respective short line railroads, and more service than was rendered by the said Millwood Coal Company.

That during the periods of the plaintiff's ownership of its said collieries, the said Latrobe Coal and Coke Company owned a short line railroad leading from its said collieries to the said defendant's railroad, or its branches, over which the empty and loaded cars were transported between the collieries of the last mentioned company and the junction of the said short lines with the defendant's railroad, or its branches, as aforesaid, by the defendant with its own motive power and then the loaded cars were taken to their destination. That said Latrobe Coal and Coke Company did not own a small locomotive, or supply any motive power upon the said short line of railroads.

That during the periods of the plaintiff's ownership of its said collieries, the said Boliver Coal and Coke Company owned neither a short line railroad between its collieries and the defendant's
15 railroad, or its branches, nor any locomotive, and supplied no motive power for transporting its products from its collieries to the railroad of the defendant company, or its branches; but on the contrary the said defendant railroad not only owned the short line railroad, leading from the defendant railroad to the said Boliver Coal and Coke Company's collieries, but supplied all the motive power in hauling the said product from the said mines to market.

That during the entire period of ownership by the said plaintiff of all of its said collieries (except the said Gallitzin colliery, and as to it, from April 1, 1897, to October 1, 1899) the plaintiff owned the several short lines of railroad between the said collieries and the defendant railroad or its branches, over which the coal and coke were transported by the said defendant with its own motive power, from the said collieries to the junction of the said short lines with the said defendant railroad, or its branches. As to the Gallitzin colliery from October 1, 1899, to May 1, 1901, the said plaintiff owned not only the said short line of railroad, but supplied the motive power as well, as has been fully stated above.

That all coal and coke produced and shipped to points within the State of Pennsylvania from all the above mentioned collieries, including those owned by the plaintiff as well as those owned by other persons or corporations, respectively, was shipped over the railroad of the said defendant company, or its branches, and said defendant carries the said coal and coke to market as a common carrier.

That the coal and coke produced and shipped over the defendant's railroad, or its branches, by the said plaintiff from the said Gallitzin colliery, between October 1, 1899, and May 1, 1901, as well as the coal and coke shipped during said last mentioned period from the collieries of the Altoona Coal and Coke Company, Glen White Coal and Lumber Company and the Millwood Coal Company by their respective owners, was carried to the same general
16 markets, and that the said defendant in the transportation of all the said coal and coke for the plaintiff and for the said Altoona Coal and Coke Company, Glen White Coal and Lumber Company and Millwood Coal Company, like and contemporaneous

service in the transportation of a like kind of traffic under substantially similar circumstances and conditions.

That the defendant, as a common carrier, was in duty bound, in fixing freight rates for the transportation of coal and coke under substantially similar circumstances and conditions, to treat every shipper alike, but the defendant, during part of the period of the ownership by the plaintiff of its said Gallitzin Colliery, to wit, from October 1, 1889, to May 1, 1901, disregarding its duty in this respect, and without the knowledge or consent of the plaintiff illegally and unlawfully allowed and paid to the sail Altoona Coal and Coke Company and the Glen White Coal and Lumber Company (which companies owned and operated with their own motive power the short line railroads connecting their said collieries with the railroad of the defendant company, or its branches) and to the Millwood Coal Company (which, as above stated) transports its product to defendant's track in its cars, and there unloads it into defendant's cars, during the said period from October 1, 1899, to May 1, 1901, a special rebate or drawback of fifteen cents per ton on all of the coal and coke which passed over the said short lines of the said Altoona Coal and Coke Company, Glen White Coal and Lumber Co. and Millwood Coal Company, from their said collieries to the junction of the said short lines with the defendant's railroad, but allowed no rebate or drawback, or any compensation whatever, to the plaintiff for the coal and coke shipped on the defendant company's railroad or its branches, by the plaintiff, and which passed over the short line of the plaintiff from the said plaintiff's collieries to the junction of said short line with defendant's railroad, or its branches, and which was hauled to such last mentioned junction by motive power owned and operated by the plaintiff.

17 That during the said period, to wit, from October 1, 1899, to May 1, 1901, there was produced from plaintiff's said Gallitzin Colliery, and shipped over defendant's railroad to market within the State of Pennsylvania, upwards of 122,706 tons of coal and 105,683 tons of coke, all of which coal and coke passed over the plaintiff's said short line of railroad connecting plaintiff's said Gallitzin Colliery and the defendant's railroad, and was hauled from the said colliery to the junction of plaintiff's short line of railroad with defendant's railroad, by motive power owned and operated by the plaintiff.

That during the period of the said plaintiff's ownership of its said collieries the coal and coke produced and shipped over the defendant's railroad, or its branches by the said plaintiff from the said Columbia Collieries Nos. 4, 6 and 7, Bennington Colliery, Hastings Colliery, and Gallitzin Colliery, between April 1, 1897, and October 1, 1899, as well as the coal and coke shipped by the said Latrobe Coal and Coke Company and the Boliver Coal and Coke Company from their said collieries, between April 1, 1897, and May 1, 1901, was carried to the same general markets, and that the said defendant in the transportation of all of said coal and coke did for the plaintiff and for the said Latrobe Coal and Coke Company and the Boliver Coal and Coke Company like and contemporaneous

service in the transportation of a like kind of traffic under substantially similar circumstances and conditions.

That the defendant during the period of the plaintiff's ownership of the said Columbia Collieries Nos. 4, 6 and 7, Bennington Colliery, Hastings Colliery, and Gallitzin Colliery from April 1, 1897, to October 1, 1899, disregarding its duty and without the knowledge or consent of the plaintiff, illegally and unlawfully allowed and paid to the above mentioned colliery companies and others owned by persons and corporations other than the plaintiff,
18 which did not own or supply motive power to move the coal and coke produced by them from the respective collieries to the railroad of the defendant company, or its branches, viz.: to the Latrobe Coal and Coke Company and the Boliver Coal and Coke Company and others, during the said period, a special rebate or drawback of ten cents per ton on all coal and coke produced by said Latrobe Coal and Coke Company, and a special rebate or drawback of ten cents per ton on all coke produced by said Boliver Coal and Coke Company which passed over the said short lines connecting said two last mentioned collieries with the railroad of the defendant company or its branches, but allowed no rebate or drawback or any compensation whatever to the plaintiff for the coal and coke shipped on the defendant company's railroad or its branches by the plaintiff, and which passed over the short line of the plaintiff, from the said plaintiff's collieries, to the junction of said short line with defendant's railroad or its branches.

That during the period from April 1, 1897, to October 1, 1899, plaintiff produced from its Gallitzin Colliery, and shipped to market within the State of Pennsylvania, over the railroad of the defendant company and its branches, 161,818 tons of coal and 129,361 tons of coke, all of which passed over plaintiff's short line railroad from the said colliery to defendant's railroad, being hauled by motive power furnished by defendant company.

That during the period from April 1, 1897, to May 1, 1901, plaintiff produced from its Columbia Colliery No. 4, and shipped to market within the State of Pennsylvania, over the railroad of the defendant company and its branches 44,403 tons of coal; all of which passed over plaintiff's short line railroad from the said colliery to defendant's railroad, being hauled by motive power furnished by defendant company.

That during the period from December 8, 1898, to May 1, 1901, plaintiff produced from its Columbia Colliery No. 6, and
19 shipped to market within the State of Pennsylvania, over the railroad of the defendant company and its branches, 55,007.8 tons of coal, all of which passed over the plaintiff's short line railroad from the said colliery to defendant's railroad, being hauled by motive power furnished by said defendant company.

That during the period from July 20, 1899, to May 1, 1901, plaintiff produced from its Columbia Colliery No. 7, and shipped to market within the State of Pennsylvania, over the railroad of the defendant company and its branches, 16,281.6 tons of coal, all of which passed over plaintiff's short line railroad from the said colliery

to defendant's railroad, being hauled by motive power furnished by defendant company.

That during the period from October 30, 1899, to May 1, 1901, plaintiff produced from its Bennington Colliery, and shipped to market within the State of Pennsylvania, over the railroad of the defendant company or its branches, 30,816.1 tons of coal and 15,142 tons of coke, all of which passed over plaintiff's short line railroad from the said colliery to defendant's railroad, being hauled by motive power furnished by defendant company.

That during the period from April 1, 1897, to May 1, 1901, plaintiff produced from its Hastings Colliery and shipped to market within the State of Pennsylvania, over the railroad of the defendant company and its branches, 65,026.8 tons of coal and 78,610.29 tons of coke, all of which passed over plaintiff's short line railroad from said colliery to defendant's railroad, being hauled by motive power furnished by defendant's company.

That for services rendered as aforesaid to the plaintiff in transporting to market within the State of Pennsylvania the coal and coke produced by and shipped from plaintiff's said Gallitzin Colliery during the period from October 1, 1899, to May 1, 1901, the defendant company, has, by reason of the aforesaid rebate of fifteen cents per ton allowed to the said Altoona Coal and Coke Company, Glen White Coal and Lumber Company, and Millwood Coal Company, charged, demanded, collected, and received from the plaintiff a greater compensation than it has charged, demanded, collected or received from the last mentioned colliery companies, for rendering substantially the same service as rendered to the plaintiff.

That for services rendered as aforesaid to the plaintiff in transporting to market within the State of Pennsylvania the coal and coke produced by and shipped from plaintiff's said Gallitzin Colliery during the period from April 1, 1897, to October 1, 1899, and from plaintiff's said Columbia Collieries Nos. 4, 6 and 7, Bennington Colliery and Hastings Colliery during plaintiff's period of ownership of said last mentioned collieries, the defendant company, has by reason of the aforesaid rebate of ten cents per ton, allowed to the said Latrobe Coal and Coke Company on all coal and coke shipped by said colliery as aforesaid, and to the said Boliver Coal and Coke Company on all coke shipped by said colliery as aforesaid, charged, demanded, collected, and received from the plaintiff a greater compensation than it has charged, collected or received from the last mentioned colliery companies for rendering substantially the same services as rendered to the plaintiff.

That the said charges of fifteen and ten cents per ton for coal and coke, respectively, made to plaintiff, over and above the charge made as aforesaid to the Altoona Coal and Coke Company, Glen White Coal and Lumber Company, Millwood Coal Company, and as aforesaid to the Latrobe Coal and Coke Company and to the Boliver Coal and Coke Company, constituted an illegal, unlawful and unreasonable discrimination against the plaintiff as a shipper of coal and coke over the lines of the defendant's said railroad, and that

by reason of the premises the plaintiff has been damaged in the sum of thirty-four thousand two hundred and fifty-eight and 35/100 dollars for the coal and coke shipped by said plaintiff from its
21 Gallitzin Colliery between October 1, 1899, and May 1, 1901, where the overcharge was fifteen cents per ton as aforesaid; and in the sum of fifty-nine thousand six hundred and forty-six dollars and sixty-five cents for the coal and coke shipped by said plaintiff from its other collieries, including the coal and coke from the said Gallitzin Colliery from April 1, 1897, to October 1, 1899, where the overcharge was ten cents per ton as aforesaid.

That payment of said aggregate sum of ninety-three thousand nine hundred and five dollars has been duly demanded, but that defendant has failed, neglected and refused to pay the same or any part thereof. Wherefore the plaintiff demands judgment against the defendant for the sum of ninety-three thousand nine hundred and five dollars.

——— ———,
Attorney for Plaintiff.

22 Court of Common Pleas No. 3 of Philadelphia County, March Term, 1905.

No. 543.

MITCHELL COAL & COKE COMPANY
v.
PENNSYLVANIA RAILROAD COMPANY, Appellant.

Defendant's Plea.

Defendant in the above pleads "Not Guilty."

JOHN G. JOHNSON,
Per E. A. WATERS,
Attorney- for Said Defendant.

To Phothonotary C P.: December 4, 1905.

Pleas.

By leave of Court the defendant in the above pleads non assumpsit infra sex annos and actio non accrevit infra sex annos.

JOHN G. JOHNSON,
MAURICE B. SAUL,
Attorney- for Defendant.

To Prothonotary C. P.: June 6, 1907.

23 C. P. No. 3, Philadelphia County, March Term, 1905.

No. 543.

MITCHELL COAL & COKE COMPANY
vs.
PENNSYLVANIA RAILROAD COMPANY.

It is agreed that all questions of law and fact in this case shall be submitted to Hon. Theodore F. Jenkins as Referee, whose duty it shall be to take testimony; to report the same to the Court; to report Findings of Fact and Conclusions of Law; also to report whether judgment should be entered for plaintiff or for defendant, and, if judgment should be entered for the plaintiff, in what amount.

The Referee shall have all the powers of a Master in Chancery and his final report shall have the same force and effect which would attach to a report of a Master in Chancery.

Either party shall have a right to file exceptions with said Referee within fifteen days of written notice of intention to file his report.

It shall be the duty of the Referee to report any such exceptions so filed with him, together with any matter which he may deem pertinent by way of fact or law, in connection therewith.

The Court shall hear the case upon said report as though said report were that of a Master in Chancery, and shall enter such judgment thereon as it shall deem proper.

Either party shall have a right to appeal from the judgment of the Court, entered upon said report and exceptions, to the Supreme Court of Penna. The record upon said appeal shall include the testimony taken by the Master.

The employes of the defendant shall appear before the Referee upon reasonable notice, without the necessity of service of the subpœna. All relevant books and papers will be produced before
24 the Referee.

Unless the plaintiff shall desire otherwise the hearing by the Referee will proceed de die in diem. Both parties will facilitate the hearing and determination of the case.

GEO. S. GRAHAM,
Att'y for Pl'ff.

April 24/07.

JOHN G. JOHNSON,
Att'y — Def't.

24 Apr. 1907.

Endorsement: No. 543. March Term 1905—C. P. No. 3—Mitchell Coal & Coke Co. v. Pennsylvania Railroad Company—Agreement of Parties to Refer to Theodore F. Jenkins—Filed with Referee April 26, 1907.

25 *Testimony.*

J. G. SEARLES, having been duly sworn, was examined as follows:

By Mr. GILFILLAN:

* * * * * * *

Q. Tell us what was the lateral allowance on both coal and coke for the Altoona Coal and Coke Company during the period of 1897, 1898, '99. 1900 and 1901?

A. On shipments to Hollidaysburg and intermediate points the allowance on coal was 13 cents per gross ton, on coke 10 cents per net ton. On shipments to points east of Altoona or south of Hollidaysburg on coal 18 cents per gross ton, on coke, 20 cents per net ton.

Q. That applied to both state and interstate?

A. Yes sir.

Q. Was the lateral allowance on either coke or coal from
26 either of the points that you have just mentioned higher prior to 1897, and during your term of office as Coal Freight Agent?

A. No, not to my knowledge.

Q. Give us the lateral allowance for coal and coke on shipments of the Glen White Coal & Lumber Company during the period of 1897, '98, '99, 1900 and 1901?

A. On coal 15 cents per gross ton; on coke 15 cents per net ton.

Q. Give us the lateral allowance on both coal and coke for the period of 1897, '98, '99, 1900 and 1901 to the Latrobe Coal Company?

A. On coal 10 cents per gross ton; on coke 10 cents per net ton.

Q. Give us the lateral allowance on coke for the same period, 1897, '98, '99, 1900 and 1901, to the Boliver Coal and Coke Company?

A. On coke 15 cents per net ton. That allowance applied only on eastbound shipments.

Q. On all the other companies it applied to east and west?

A. Yes, sir. They did not ship any west, though.

Q. Do you know what the allowance to the Millwood Coal Company was during that same period?

A. Yes, sir.

Q. What was the lateral allowance to the Millwood Company during 1897, '98, '99, 1900 and 1901 on coal?

A. From April 1st, 1897, to March 31st, 1899, 15 cents per gross ton on coal; and from April 1st, 1899, to May 1st, 1901, 10 cents per gross ton eastbound shipments.

Q. Was the lateral allowance to the Altoona Coal and Coke Company that you have testified to only on eastbound shipments, or was it on all coal produced by the mines?

A. I cannot answer that question definitely, because I have
27 not looked as to that, but I am under the impression that it applied only on eastbound business. The fact is they shipped very little coal or coke westbound.

Q. Is the same true of the Glen White Coal and Lumber Company eastbound shipments?

A. Yes, sir. I would not like to say positively as to westbound shipments, but that is my impression now.

Q. Will you look it up and let us know tomorrow?

A. I will.

Q. You are of the same impression as to Latrobe?

A. No, the Latrobe got the lateral allowance on both east and westbound. The copy of the letter you have here states that.

Q. You mean the letter to Mr. Joyce?

A. Yes, sir.

Q. How about the Bolivar?

A. The Bolivar applied only on eastbound business.

Q. And the Millwood?

A. The Millwood only on eastbound shipments.

Q. You spoke about a point, Hollidaysburg, that the allowance was 13 cents. Where is Hollidaysburg situated?

A. It is on the Hollidaysburg branch, they call it. It is a few miles south of Altoona, I think, but it is reached by a branch that goes off at Altoona.

Q. When you spoke in your testimony about Hollidaysburg and intermediate points, you mean between the mines of the Altoona Coal Company, Hollidaysburg, and intermediate points?

A. Yes, sir.

Q. These lateral allowances were paid to the various companies, the Altoona Coal and Coke Company, the Glen White Coal and Lumber Company, the Latrobe Coal Company, the Bolivar Coal and Coke Company and Milwood Coal Company?

A Yes, sir, during the period specified.

28 J. L. MITCHELL, having been duly sworn, was examined as follows:

* * * * * * *

Q. Did you have anything to do with the arranging for the rates for the transportation of the coal with the officials of the Pennsylvania Railroad?

A. Yes, sir.

Q. Tell the Referee just what was done with relation to fixing the rates and about the settlements that occurred during the period when shipments were made at rates different from the so-called quoted or published rates, and who was bound to pay the freight? I mean from 1897 down to and including 1901?

A. I think in 1897 to probably April, 1898, when there were those published rates, we paid freight according to the tariff rates given, and in 1898 and 1899, and I think up to some time in 1900, if we wanted to ship we had to go to Mr. Searles and get a rate, that is the open rate would probably be a dollar and a half, and he would give you a rate maybe of a dollar and twenty cents or a dollar and thirty cents.

Q. Did you go before the shipment was made?

A. Yes, sir.

Q. Was any attention paid to the open rate?

A. Very little.

Q. Would shipments be made under the rate quoted by Mr. Searles during this period?

A. Yes, sir.

Q. Who was responsible for the freight?

29 A. The shipper.

Q. Who was responsible on this tonnage contained in those shipments which have been submitted to the Referee as shipments made by the Mitchell Coal and Coke Company?

A. The shipper was always responsible. Sometimes the consignee paid the freight and deducted it from the bill.

Q. Was the freight rate as quoted by Mr. Searles paid on all those shipments contained in those statements?

A. Yes, sir.

Q. And any time the consignee paid it he deducted it from the bills?

A. Yes, sir. Very often the consignee would pay the published rate and deduct it from the bill, and sometimes it would only leave us forty or fifty cents a ton for coal, and the balance came back from the Railroad Company.

Q. How did the balance come back from the Railroad Company?

A. We put in a claim at the end of the month in cases of that kind.

Q. For the difference between the open rate and the rate quoted?

A. Yes, sir.

Q. Was that taken into consideration in making your contracts for the sale of the coal to your consignee, the fact that you would get this?

A. Yes, sir; always. It would have to be.

Q. Who was finally responsible for the freight rates for the carrying of all this coal shipped by the Mitchell Coal and Coke Company, the consignee, or the shipper?

A. The shipper would be the responsible party.

Q. And sometimes it would be paid by the hand of the consignee and credit would be given the consignee in his bill?

30 A. Yes, sir.

Q. Was that responsibility of the shipper to the railroad company for the rates the same when the coal was sold F. O. B. mines?

A. Yes, sir; practically the same. That is, we gave a man a price on the coal a dollar and a quarter at the mines and the rate from our mines to that point is so much, and we would be responsible for that rate.

Q. When you sold coal, did you always tell the man what the rate would be to that point where he was?

A. In those years that the rebates were we did not tell them. In those years we would quote him a price delivered.

Q. Delivered at the destination?

A. What his coal would cost him at the point of destination.

Q. Explain to us what you did after this period of the rebating

between the open rate and the quoted rate was stopped, about the selling of the coal?

A. Sometimes it was sold at a delivered price at point of destination and freight prepaid, but not very often. Other times it was deducted from the bill, and other times it was just billed at the mines and prepaid.

Q. As I understand it there were three methods; the coal delivered at the point of destination at a delivered price?

A. Yes, sir.

Q. In some of the cases you prepaid the freight?

A. Yes, sir.

Q. In others of the cases the consignee paid the freight and deducted it from your bill?

A. Yes, sir.

Q. And in some other class of cases, where it was sold F. O. B. the mines, the consignee paid the freight?

A. Yes, sir.

Q. In all of those classes, who made arrangements with
31 the Pennsylvania Railroad Company as to what the freight rate was?

A. When there was any difference in the rate over the published rate, the shipper always made it, and the shipper always got a copy of the open rates and notified his consignees what the rate would be, though the shipper was the responsible party for the freight.

Q. No matter how the coal was sold?

A. Yes, sir.

Q. And if there was any change in the rates, who was responsible for the excess?

A. If the rates were raised we notified them. Probably we would not notify them as quick if they were reduced.

Q. To whom did the railroad look in all these cases for the payment of freight?

A. To the shipper, and the shipper was the party that furnished the rates.

* * * * * * *

32 J. L. MITCHELL, recalled.

By Mr. GILFILLAN:

* * * * * * *

Q. Tell us about the installation of the locomotive at Gallitzin. When was it put on?

A. In October, 1899.

Q. It continued down to May 1st, 1901?

A. Yes, sir.

Q. Tell us the conditions under which you put it on?

A. When we first started there the Railroad Company did practically all the switching; we had to do a little with horses. In about 1898, I think, we increased our capacity a good deal; we built some ovens, and we couldn't get along with the amount of work the company did; they only came in once a day with empties and took out the loadeds, and we had to do a great deal of work

with horses, and we shipped a good deal of coal, and between points west of Bellwood and Hollidaysburg branch our neighbors had so much better rate by doing their own shifting; that is, it either cost them from a cent to a cent and a half a ton to do it with their own locomotive; and so I just bought a locomotive and did the same work, expecting, in fact trying, to compete.

Q. What did the Altoona Coal and Coke Company and the Glen White Coal and Lumber Company get for doing that shifting?

33 A. I suppose at that time it was ten cents a ton. Just before this suit was brought I found it was more.

Q. How much; do you know?

A. Eighteen cents on coal for the Altoona Coal and Coke Company, and twenty cents on coke, and Glen White was fifteen cents on each. My rate to Hollidaysburg was forty-five cents. My mine was probably three miles or four miles further from Hollidaysburg than the Altoona Coal and Coke Company, and with their locomotive and the difference in the other rate from Kittanning Point, they had nineteen cents; that is, I paid forty-five cents and they paid twenty-six cents, I think.

Q. Explain about that rate. You said Kittanning Point. From Kittanning Point to points west of Bellwood and on the Hollidaysburg branch, the freight rate was thirty-nine cents to the Altoona Coal and Coke Company and the Glen White Coal and Coke Company?

A. Yes, sir.

Q. And from Gallitzin and west of Bellwood and on the Hollidaysburg branch, the rate was forty-five cents?

A. Yes, sir.

Q. Then the Altoona Coal and Coke Company got thirteen cents lateral for doing the shifting, and the Glen White got fifteen cents lateral for doing the shifting?

A. Yes, sir.

Q. And you got nothing for doing the shifting at Gallitzin?

A. No, sir.

Q. Your mine was at Gallitzin?

A. Yes, sir.

Q. And Kittanning Point was the shipping point of the Glen White and Altoona?

A. Yes, sir.

Q. As I understand it, the haul from Gallitzin was a little farther than the haul from Kittanning Point?

34 A. Yes, sir.

Q. About how many miles?

A. It is about six miles; between five and six.

Q. What would the average cost per ton be for that haul?

A. I could not tell that.

Q. You put your locomotive on in October, 1899?

A. Yes, sir.

Q. October 1st?

A. Yes, sir.

Q. Did you do exactly the same service to the Pennsylvania Railroad that the Glen White and Altoona Coal Company did?

A. As far as I know, yes, sir.

Q. Did you not do it?

A. Yes, sir.

Q. You delivered the coal from the Gallitzin mine at the junction of the siding of the Gallitzin with the tracks of the Pennsylvania Railroad?

A. Yes, sir.

Q. Was not that exactly what the Glen White and the Altoona Coal and Coke Company did?

A. Yes, sir; the same thing.

* * * * * * *

35 Mr. J. L. MITCHELL recalled for further cross-examination.

Recross-examination.

By Mr. GOWEN:

* * * * * * *

Q. When you were negotiating with the railroad company with reference to the movement of your coal over the Gallitzin spur yourself, you wanted them to pay you five cents a ton for your services, did you not?

A. I started in with Mr. Shepherd and wanted ten cents, and he said that was unreasonable and they wouldn't pay anything like that, and he says, "See if you can't do something better than that," or talk of that kind. So then I made a request, that is, made an offer to do it at five cents.

Q. And that five cents was to be paid on all the coal moved over it?

A. Yes, sir.

Q. Even though it went to those short points?

A. Yes, sir. Because I understood they didn't get it on short points.

* * * * * * *

36 J. B. SEARLES, recalled.

By Mr. GILFILLAN:

* * * * * * *

Q. You did give the same net rate to Columbia for coal from Latrobe as from Clearfield, shipped to tidewater to be shipped outside the capes?

A. No, sir. I think not. Not until we reduced the rates from Latrobe to the Clearfield basis.

Q. When was that?

A. I think that was the 1st of April, 1900. I am not quite clear about that.

Q. Was it not April 1st, 1899?

A. Possibly. I am speaking from memory. I do not know.

Q. What is your best recollection; was it April 1st, 1899, or April 1st, 1900?

A. It might have been April 1st, 1899. I am not positive.

Q. From that time on the rates were the same from Latrobe and from Clearfield region?

A. They were and are today.

Q. And have continued to be from April 1st, 1899?

A. From the time we changed the tariffs; yes, sir.

Q. Which is, according to the best of your recollection, about April 1st, 1899?

37 A. Yes, sir; April 1st, 1899, or April 1st, 1900, I cannot say which. I will look it up.

Q. What books would show?

A. Our tariffs.

Q. Will you bring your tariff books with you the next time?

A. There are a great many of them. They would fill this room.

Q. You will look it up and verify it?

A. Yes, sir. As to tidewater you are talking about now?

Q. Just now I am talking about tidewater. Define what you mean by tidewater?

A. We mean by tidewater, coal shipped from the shipping piers at tidewater transferred into boats.

Q. That means tidewater at any place?

A. We only have three tidewater shipping points.

Q. What are they?

A. Baltimore, Philadelphia and South Amboy.

Q. It is only to those three places that the phrase "outside the capes" is used?

A. It only applies to Baltimore and Philadelphia.

Q. The rate was the same then from Latrobe and Clearfield regions prior to April 1st, 1899, in some instances on coal that was shipped to South Amboy to be re-shipped?

A. I do not think so.

Q. The instances to which you have referred as — the rates from Latrobe and Clearfield being the same prior to April 1st, 1899, referred to Baltimore or Philadelphia?

A. I do not think I testified that the rates were the same prior to April 1st, 1899. I did not mean to.

Q. Did you not say a few moments ago that you found a few instances where the Clearfield and Latrobe rates were the same on coal shipped to tidewater to be reshipped outside the capes?

A. Prior to April 1st, 1899?

38 Q. Yes.

A. No; I do not think I said that.

Q. You did not mean it as prior?

A. No, sir.

Q. Since April 1st, 1899, the rates from Latrobe and Clearfield regions on coal have been the same, no matter where the destination was?

A. No; I did not say that, either. I said I could not be positive as to the date.

Q. Assuming that April 1st, 1899, is the correct date, then what is your answer to the prior question?

A. Then I would say they were the same, assuming that was the date we changed our tariffs.

Q. Depending on whether April 1st, 1899, or April 1st, 1900, is the correct date, all shipments on coal from Latrobe and Clearfield regions were shipped at the same rate, no matter what the points of destination were?

A. No; that would not be so.

Q. Wherein is it not so?

A. When we can clearly define the date upon which the tariffs were issued, making the same rates from the Latrobe region as from the Clearfield region, then to points east of Lewistown Junction, I think, or, perhaps, points east of Harrisburg, Harrisburg and points east, the rates would be the same.

Q. Whether tidewater or not?

A. Yes, sir.

Q. What did you mean when you said that you found a few instances where the Latrobe and Clearfield net rates were the same when shipped to tidewater for reshipment outside the capes?

A. I do not know that I can answer that, because I cannot recall during what period that was. I think we have it on some statements that we have here.

Q. Were there any shipments from Latrobe which had the same net rate as from Clearfield prior to April 1st, 1899?

A. That I could not answer without going over our books again.

39 Q. What did you mean to convey when you made the apparent differentiation of coal to be re-shipped outside the capes?

A. There are two rates on tidewater coal both to Baltimore and Philadelphia, one which applies on coal reshipped in the case of Philadelphia, outside the capes of the Delaware, and in the case of Baltimore, on coal shipped outside the capes of the Chesapeake, but the other places, on coal re-shipped and delivered on water to points located on the water front within the capes of the Delaware or the Chesapeake, as the case may be.

Q. What did you mean when you said in answer to my question that there were some instances where the Clearfield and Latrobe net rates were the same, and those instances were where coal was shipped to tidewater to be reshipped outside the capes?

A. I think I must have meant subsequent to that period, after we changed the tariffs.

Q. After you changed the tariff——

A. It would be the same.

Q. But there would be no difference inside or outside the capes or on the line of the railroad?

A. No.

Q. So far as the difference between the regions was concerned?

A. No.

By Mr. GOWEN:

Q. Are you not wrong about that, because were not the interstate points made the same first?

A. Yes. On October 19th, 1896, the rates to New York State points reached via the Northern Central Railway, that is the
40 junction point on the line of the Northern Central Railway, north of Williamsport, were from the Latrobe region made the same as from the Clearfield region. That was the first. That also applied to some points reached via Wilkes-Barre. On April 1st, 1899, they were the same to all interstate points eastbound.

By the REFEREE:

Q. You mean rail points?
A. Yes, sir. Rail and tidewater, I assume.

By Mr. GILFILLAN:

Q. That was either all rail or tidewater?
A. All interstate points eastbound. The same date to points on the Lehigh Valley Railroad. That would be points, I think, within the State of Pennsylvania, via Mt. Carmel, and the Central Railroad of New Jersey points via Buttonwood, I assume—my memory is not clear on that—the rates from Latrobe were made the same as from Clearfield.
Q. As of April, 1899?
A. Yes, sir. On December 3rd, 1900, they were made the same from the Latrobe region as from the Clearfield region to points in Pennsylvania, Harrisburg and the east and south thereof, via our own line, and also points on the Philadelphia and Reading Railway via Harrisburg.
Q. Baltimore came within the group of interstate as to which the Latrobe and Clearfield rates were made the same April 1st, 1899?
A. Yes, sir.
Q. Into which group would shipments made to Greenwich for re-shipment come?
A. They would be considered as points within the State of Pennsylvania.
Q. State when it was that Clearfield and Latrobe rates were made the same as to points within the State of Pennsylvania?
A. December 3rd, 1900.
41 Q. Shipments made to Greenwich for distribution, say along the water front, would be intrastate?
A. Intrastate; yes, sir.
Q. And shipments made to Greenwich for reshipment outside the capes would be interstate?
A. So far as this was concerned, so far as the rates that were charged. All of this testimony on this point has been in regard to coal. I am not testifying as to coke rates.
Q. When were the rates on coal shipped from the Latrobe region and Clearfield region made the same where the coal was sent to Greenwich for re-shipment outside the capes?
A. For re-shipment by water outside the capes, or within the capes, December 3rd, 1900.

* * * * * * *

42 Q. You furnished these letters in response to my request? (Referring to a letter dated Philadelphia, February 12, 1897, from J. G. Searles to Mr. O. A. Knipe, and also a letter dated April 15, 1898, from said Searles to said Knipe, and also letter of April 6, 1899, from said Searles to said Knipe.)

A. Yes, sir. I wish to say, at the time this letter of February 12, 1897, was written, the tariffs did not show the net rates at which the auditor would collect the freight charges. This letter was, therefore, written as a guide to him as to the rates at which he was to render bills to the consignee or the shipper of this coal.

Q. That explanation is as to all the letters you refer to?

A. Yes, sir.

Q. When you say the tariffs did not show it, the tariffs never do show it, do they?

A. They do now.

Q. But they did not during the period when rate allowances were made?

A. No.

The letters produced by the witness offered in evidence and read as follows:

"PHILADELPHIA, February 12, 1897.

Mr. O. A. Knipe, A. C. F. R.

DEAR SIR: Taking effect this day, the rail proportions of through rates on Bituminous coal for other than gas purposes, shipped via Harsimus, South Amboy, or Greenwich, to points beyond, will be as follows per 2,240 pounds, f. o. b.—

43

Via—	Clearfield Region.	G.C.&C.R.R., via State Line.	Latrobe Region.	Westmoreland Region.	P. V. & C. Ry.
Harsimus	$1.40	$1.45	$1.42	$1.65	$1.80
South Amboy...	1.35	1.40	1.37	1.60	1.75
Greenwich, inside Capes..	1.20	1.20	1.35	1.45	1.60
Greenwich, outside Capes.	.88	1.00	.90	1.25	1.40

Shipments consigned via Greenwich to points in Chesapeake Bay or within the Chesapeake Capes will be charged same as coal for points inside Delaware Capes.

Yours truly,

(Signed) J. G. SEARLES, *G. F. A.*"

"PHILADELPHIA, April 15, 1898.

Mr. O. A. Knipe, A. C. F. R.

DEAR SIR: Taking effect April 1, 1898, the rail proportions of through rates on Bituminous coal, for other than gas purposes, shipped via Harsimus, South Amboy, or Greenwich, to points beyond, will be as follows per 2,240 pounds, f. o .b.—

	Clearfield Region.	G. C. & C. R. R., via State Line.	Latrobe Region.	Westmoreland Region.
Harsimus	$1.25	$1.45	$1.27	$1.55
South Amboy.....	1.20	1.40	1.22	1.50
Greenwich, inside Capes....	.90	1.20	1.05	1.30
Greenwich, outside Capes...	.75	1.00	.77	1.12

Shipments consigned via Greenwich to points in Chesapeake Bay or within the Chesapeake Capes will be charged the same as coal for points inside the Delaware Capes.

44 While these rates are to take effect from April 1st, I presume it is too late now to correct the bills for shipments made April 1st to April 9th, inclusive, and we shall have to adjust these through the overcharge account.

Yours truly,

(Signed) J. G. SEARLES,
Coal Freight Agent."

"April 6, 1899.

Mr. O. A. Knipe, A. C. F. R.

DEAR SIR: I beg to advise you that, taking effect April 1, 1899, the rail proportions of through rates on Bituminous coal shipped via Harsimus, South Amboy, or Greenwich, to points beyond, will be as follows, per 2,240 pounds f. o. b.—

	From Clearfield Region.	From G. C. & C. R. R., via State Line.	From Latrobe Region.	From Westmoreland Region.
To Harsimus.....	$1.00	$1.15	$1.00	$1.25
" South Amboy..	.95	1.10	.95	1.20
" Greenwich, inside Capes.	.80	.80	.80	1.05
" Greenwich, outside Capes.	.65	.77	.65	.90

Will you please arrange accordingly and oblige,

Yours truly,

(Signed) J. G. SEARLES,
C. F. Agent."

The WITNESS: Those are rates at which the freight charges were collected from the consignees or shippers.

Q. Then the settlement was made from those figures to the quoted rate?

A. Those were practically the tariff rates.

* * * * * * *

45 Examination of J. B. SEARLES resumed.

By Mr. GILFILLAN:

* * * * * * *

Q. Did the Millwood Coal & Coke Co. receive the lateral allowance, heretofore referred to by you on all commercial coal produced and shipped by them, either directly or by some consignee, who purchased the coal f. o. b. the mines?

A. Yes, sir; to the eastern points.

Q. Points east of Lewistown Junction?

A. Yes, sir.

Q. Did the Bolivar Company receive the lateral heretofore referred to by you, whatever they were, on the coke produced by it and shipped either directly by the Bolivar Co. or by some other consignee who purchased f. o. b. the mines?

A. I think so.

Q. That is true of both coke and coal in all cases, is it not?

A. No. We made no lateral allow*nace* to the Bolivar Coal & Coke Co. on coal.

Q. They did not ship any, did they?

A. Yes, they shipped a little coal.

Q. The Altoona Coal & Coke Co. had the lateral allowance on the coke that was produced by it no matter who made the shipment, or where it went?

A. Yes, sir.

Q. Providing it went to points east of Lewistown Junction?

A. Yes, sir.

Q. The same is true of the Glen White Coal Co.?

A. Yes, sir.

Q. The same is true of the Millwood Company?

A. No; your question was about coke. The Millwood Company shipped coal.

Q. No coke?

A. No coke.

By the REFEREE:

Q. You say they did not ship any coke, but they did ship coal?

A. Yes, sir.

By Mr. GILFILLAN:

Q. As to the Latrobe Co., they received laterals on coke
46 shipped to points east of Lewistown Junction on all coke produced by the Latrobe Co., whether shipped by it or somebody else?

A. Yes, sir; produced from the Latrobe Coal Co.'s mines.

Q. Those laterals ran during the entire period that you have heretofore testified the laterals were allowed?

A. Yes, sir.

Q. In other words, the laterals on coal and coke were allowed to those various companies, regardless of the time of shipment or the destination?

A. During the period that I testified that we were making them the lateral allowance.

Q. With that exception, that is, during the period when the allowances were made, the companies were allowed the lateral allowances on all coal and coke as heretofore testified to by you, regardless of destination and regardless of the time within the period when the shipments were made? Is that correct?

A. Yes, sir.

Q. These lateral allowances were made to these various companies on the coal which the company transported as a common carrier?

A. Yes, sir.

Q. Do you know anything about John Lloyd receiving 20 cents per ton more for the Pennsylvania coal than what the other men received?

Objected to. Objection withdrawn.

A. I do not know anything about it.

Q. Do you know whether lateral allowances were made for Pennsylvania supply coal to the Altoona Coal & Coke Co., the Glen White Coal & Coke Co., the Bolivar, Millwood, Latrobe, or any of them?

A. I know that we made no lateral allowance at all on supply coal for a railroad company.

47 Q. Do you know, or do you not know whether lateral allowances were made to either of the five companies just named, that is, the Altoona, Glen White, Millwood, Bolivar and Latrobe companies for Pennsylvania supply coal that was purchased from them?

A. I know that I never made them any lateral allowance, and I do not think that anybody else would.

Q. You are sure of that, that no lateral allowance ever went through your office?

A. I am quite sure.

Q. Then as I understand it, the published tariff rate was reduced in the first instance by the difference between the published rate and the net or quoted rate?

A. To some points it was.

Q. To some points, and to some people?

A. Yes, sir.

Q. Then, so far as the Altoona, the Glen White, the Millwood, the Bolivar and Latrobe were concerned, the freight rate was further reduced by the lateral allowances made to those companies?

A. Practically, yes, sir. But there was a great deal of other coal that was shipped on which we made no allowance from the tariff rate other than the lateral.

* * * * * * *

Q. Do you not know that you charged Mitchell a dollar freight to Philadelphia when coal was transported for somebody to the Atlantic Refining Co. for 80 cents?

A. I did not know. I could not tell who the coal was shipped to. The statements that we have made up show that we made settlement

with Mr. Mitchell on coal to Greenwich Piers, Philadelphia, or to somebody else.

48 JAMES L. MITCHELL, recalled.

By Mr. GOWEN:

Q. In the statement of shipments made by your company to South Amboy and to Greenwich, are included, are there not, a number of shipments which were turned over by you after the arrival of the coal at Greenwich and South Amboy to other companies, upon terms which obligated them for the price of the coal at the mines, they paying the freight on that coal?

A. Yes, sir; in come cases. At that period the coal was weighed at South Amboy or Greenwich and the freight paid when the vessel was loaded, and we would very often be short coal and we would have to borrow from other people, and in some cases we sold and then they would pay us back that amount of coal. There was usually a bill passed between us.

Q. Take for instance coal which you shipped to Greenwich and turned over under the circumstances referred to, to the Sterling Coal Company. Did you enter into any obligation at that time to take a similar amount of coal from the Sterling Coal Company?

A. In some cases when I would get it from the Sterling Coal Company I would agree to pay them back; whenever they needed the coal, they could call on us for it.

Q. In some cases?

A. Yes; and in some cases we sold the coal outright. That statement there will show the whole thing on it. It shows all the coal we turned over and all we borrowed.

Q. And all you got from other parties?

A. All we got from other parties, so the difference in that would have to be checked off as f. o. b. mines coal.

Q. In point of fact, this statement shows that you turned over considerably more coal than you took from others?

A. Yes, sir; very often we would sell some coal outright that we had there.

* * * * * * *

49 J. L. MITCHELL, redirect examination resumed.

* * * * * * *

Recross-examination:

* * * * * * *

Q. You have spoken of a bond which you thought the railroad company at one time required you to give, covering freight, and you said that your recollection was that that was limited to tidewater shipments.

A. Yes, sir; but I have discovered another arrangement that I made several years ago, where the cashier of the bank that I did business in in Tyrone at the time wrote the treasurer of the Pennsylvania Railroad that he would honor all drafts drawn by the

Pennsylvania Railroad on me for freight, and in that way those freights were paid.

Q. Those were freights for which you were responsible?

A. Yes, sir.

Q. In the case of the bond which you speak of, as a fact, that was limited to tidewater shipments, was it not?

A. I think that was tidewater shipments.

Q. And on tidewater shipments, due to the fact that the coal after reaching Greenwich or South Amboy was loaded on boats, the railroad company lost the control and possession of the coal before the freights were paid, did it not?

A. No; the railroad company at that time—I have forgotten the date, I think I put it in once before—in the early part of this action, the coal was shipped down to South Amboy or Greenwich and loaded by the Pennsylvania Railroad on boats and weighed by them and the freight paid, then they drew on us for the freight when it was loaded on the boat.

Q. But during the latter time and during the time that you gave this bond, practically, the railroad did not do that, did it?

A. Yes, sir; when I first commenced to ship to tidewater was when I gave this bond.

* * * * * * *

50 Common Pleas No. 3 of Philadelphia County, March Term, 1905.

No. 543.

MITCHELL COAL AND COKE CO.
vs.
THE PENNSYLVANIA RAILROAD CO.

Findings of Fact Submitted upon Behalf of the Defendant.

The Referee is requested upon behalf of the defendant to find as follows:

1. The shipments of coal and coke made from the mines of the plaintiff after March 1, 1899 (excepting those made from its Gallitzin mine between October 1st, 1899, and April 30, 1901), to points within the State of Pennsylvania aggregated 164,343 tons of coal, and 172,616 tons of coke. Of the tonnage thus shipped 102,885 tons of coal and 79,772 tons of coke were shipped by the plaintiff, and the freight on the same was paid by it, and 61,458 tons of coal and 92,772 tons of coke were shipped by purchasers from the plaintiff, who bought the coal and coke f. o. b. the mines. The coal and coke thus purchased were shipped for account of the purchasers, who paid the freight thereon, and the plaintiff was not in any way charged with the same.

2. The shipments of coal and coke made from the Gallitzin mine of the plaintiff between October 1st, 1899, and April 30, 1901, to points within the State of Pennsylvania, aggregated 103,069 tons

of coal and 122,606 tons of coke. Of the tonnage thus
51 shipped 60,093 tons of coal and 32,791 tons of coke were shipped by the plaintiff, and the freight on the same was paid by it, and 42,976 tons of coal and 89,815 tons of coke were shipped by purchasers from the plaintiff, who bought the coal and coke f. o. b. the mines. The coal and coke thus purchased were shipped for account of the purchasers, who paid the freight thereon, and the plaintiff was not in any way charged with the same.

3. The shipments of coal and coke made between March 1st, 1899, and April 30, 1901, to points within the State of Pennsylvania, from the mines of the Altoona Coal & Coke Company, the Glen White Coal & Lumber Company, the Millwood Coal & Coke Company, the Latrobe Coal Company and the Bolivar Coal & Coke Company, whether by the companies themselves, or by the purchasers f. o. b. the mines, were respectively, as follows:

	Tons of coal.	Tons of coke.
Altoona Coal & Coke Company.....	518,190	29,122
Glen White Coal & Lumber Company.....	46,876	7,611
Millwood Coal & Coke Company.....	14,492	0
Latrobe Coal Company.....	31,741	128,161
Bolivar Coal & Coke Company.....	0	8,778

4. Of the coal shipped by the plaintiff after March 1, 1899 (excluding that shipped by it from its Gallitzin mine between October 1st, 1899, and April 30, 1901), to points within the State of Pennsylvania, 49,662 tons were transported by the defendant, either alone or in conjunction with other carriers, to points and in months to and in which coal was transported from the mines of the Latrobe Coal Company. The shipments thus transported from the mines of the Latrobe Coal Company aggregated 18,130 tons, made up of 12,107 tons shipped by the Columbia Coal Mining Company, and 6,023 tons shipped either by the Latrobe Company itself or by the purchasers of the coal from it.

52 The coal shipped by the Columbia Coal Mining Company was purchased by it from the Latrobe Company f. o. b. the mines, and title to the same accordingly passed to the Columbia Company at the mines and the carriage of the coal by the defendant was for its account. The freight on this coal was paid by the Columbia Company and no reduction or concession from the tariff rate was allowed or made by the defendant thereon. The Columbia Company did not receive the benefit of any payment or any portion thereof made by the defendant to the Latrobe Company on account of services rendered by that company in connection with the transportation of the coal thus purchased, or on any other account.

The following table shows the points to which this coal was shipped and the amounts shipped to each point:

Destination of shipments.	Mitchell Co's shipments.	Amount shipped. Shipments from Latrobe Company's mines. By Latrobe Company.	By Columbia Company.
	Tons.	Tons.	Tons.
Altoona	1,977	2,327	....
Greenwich	19,081	....	7,925
Martinsburg	21	43	....
Philadelphia	28,540	3,590	4,182
Roaring Springs	43	63	....
Totals	49,662	6,023	12,107

The coal shipped by the Mitchell Company to Altoona embraced in the above table was shipped from its Gallitzin mine, and from its Columbia mines, and the rate of freight thereon varied from 36 to 55 cents per ton. The rate from the Latrobe Company's mines to Altoona was $1.00.

Of the shipments made by the plaintiff to Philadelphia embraced in the above table, 18,442 tons were shipped prior to December 1st, 1900, during which period the rate of freight from
53 the Latrobe Company's mine was 15 cents per ton higher than from the mines of the plaintiff.

All the shipments made from the Latrobe Coal Company's mine after December 1st, 1900, were made by the Columbia Coal Mining Company.

All the shipments to Philadelphia shown above made by the plaintiff and made from the mines of the Latrobe Company could have moved over two routes, one made up of the line of the defendant to Philadelphia, and the other of the line of the defendant to Harrisburg and then via the line of the Philadelphia & Reading Railway Company to Philadelphia. The evidence does not disclose by which of these routes the shipments moved.

5. Of the coal shipped by the plaintiff from its Gallitzin mine between October 1st, 1899, and April 30, 1901, to points within the State of Pennsylvania, 27,059 tons were transported by the defendant to points and in months to and in which coal was transported by it from the mines of either the Altoona Coal & Coke Company, the Glen White Coal & Lumber Company or the Millwood Coal & Coke Company.

The shipments thus transported from the mines of the Altoona Coal & Coke Company aggregated 37,017 tons; from the mines of the Glen White Coal & Lumber Company, 2,521 tons, and from the mines of the Millwood Coal & Coke Company, 970 tons.

The following table shows the points to which these shipments were made, and the amounts shipped to each point by the plaintiff and from the mines of the three companies named:

54

Destination of shipments.	Amount shipped. Mitchell Co's shipments from Gallitzin mine.	Shipments from Altoona Coal & Coke Co. mines.		Shipments from Glen White Coal & Lumber Co. mines.	Shipments from Millwood Coal & Coke Co. mines.
		Altoona.	Columbia.		
	Tons.	Tons.	Tons.	Tons.	Tons.
Altoona	2,115	13,506	....	2,293	...
Allegheny Furnace	55	754	....	....	...
Buck Run.....	57	....	....	26	...
Duncansville	349	4,350	....	....	...
Greenwich 21,207		....	12,244	....	...
Hollidaysburg ...	227	697	....	....	...
Iriquois	65	28	....	....	...
Milton	188	....	....	56	...
Martinsurg	19	44	....	....	...
Mt. Etna.....	70	24	....	....	...
Philadelphia	2,442	3,123	1,808	67	970
Roaring Springs..	46	195	....	....	...
Tyrone	135	57	....	54	...
Wertz	20	45	....	....	...
Williamsburg	64	142	....	25	...
Totals.....27,059		22,965	14,052	2,521	970

The rates from the mines of the Altoona Coal & Coke Company and the Glen White Coal & Lumber Company in force at the time the above shipments were made to Altoona, Allegheny Furnace, Duncansville and Hollidaysburg, were lower than from any of the plaintiff's mines, the rates to these points from mines in the Clearfield district not being uniform, but being based on distance.

The shipments made from the Glen White Coal & Lumber Company's mines shown in the above table embraced coal shipped by purchasers of the same f. o. b. the mines from the Glen White Company, and the shipments made by the Columbia Company from the Altoona Coal & Coke Company's mines embraced coal pur-
55 chased by that company f. o. b. the mines from the Altoona Coal & Coke Company. The title to the coal thus purchased passed to the purchasers at the mines, and the carriage of the same by the defendant was, therefore, for their account. The freights were paid by them, and they received no part of the payments made by the defendant to the Glen White Coal & Lumber Company and to the Altoona Coal & Coke Company for services rendered by them in transporting this coal over their branches or on any other account. The evidence does not disclose for whose account the shipments were made of coal from the Altoona Coal & Coke Company's mines other than that shipped by the Columbia Coal Mining Company, nor for whose account the shipments from the mines of the Millwood Coal & Coke Company were made.

Of the shipments made by the plaintiff to Philadelphia 913 tons were shipped in months in which shipments were made from the Glen White Company's mines; 871 tons in months in which shipments were made from the Millwood Company's mines, and 590 tons in months in which shipments were made from the Altoona Coal & Coke Company's mines by others than the Columbia Coal Mining Company.

6. Of the coke shipped by the plaintiff after March 14, 1899 (excluding that shipped by it from its Gallitzin mine between October 1st, 1899, and April 30, 1901), to points within the State of Pennsylvania, 24,454 tons were transported by the defendant, either alone or in conjunction with other carriers, to points to which in the same months coke was transported from the mines of either the Latrobe Coal Company or the Bolivar Coal & Coke Company. The following table shows the destination of these shipments and the amounts shipped to each point by the plaintiff, and from the mines of the Latrobe and Bolivar Companies.

56

Destination of shipments.	Amount shipped. Mitchell Company's.	Latrobe Company's. Latrobe or others.	Latrobe Company's. Columbia	Bolivar Company's.
	Tons.	Tons.	Tons.	Tons.
Catasauqua	19,403	....	316	....
Chester	17	21	....	198
Hokendauqua ..	26	....	....	154
Lebanon	18	....	1,087	....
Pencoyd	74	....	21	....
Philadelphia ..	945	266	....	....
Pottstown	181	7,344	....	....
Sheridan	2,392	....	....	1,078
Watts	1,398	....	....	242
Totals...	24,454	7,631	1,424	1,672

The rates on all shipments made from the mines of the Latrobe and Bolivar Companies which are embraced in the above table were 20 cents per ton higher than the rates from the plaintiff's mines to the same points. The shipments to Catasauqua were transported by one of two routes, one made up of the defendant's line to Mt. Carmel and the Lehigh Valley Railroad to Catasauqua, the other of the defendant's line to Nanticoke and the Central Railroad of New Jersey to Catasauqua. Two routes also were available for shipments to the other points named in the table, excepting Sheridan and Watts. The evidence does not disclose by what routes the shipments did move.

The shipments made by the Columbia Company from the Latrobe Company's mines embraced coke purchased by that company f. o. b. the mines, and the carriage of the same by the defendant was, therefore, for its account. The freights were paid by it, and it received

no part of the payments made by the defendant to the Latrobe Coal Company for services rendered by the latter company in transporting this coke over its branch, or on any other account. The
57 evidence does not disclose for whose account the remaining shipments from the Latrobe Coal Company's mines, and those from the Bolivar Company's mines, were made.

7. Of the coke shipped by the plaintiff from its Gallitzin mine between October 1st, 1899, and April 30, 1901, to points within the State of Pennsylvania, 6,059 tons were transported by the defendant to points and in months to and in which coke was transported from the mines of either the Altoona Coal & Coke Company or the Glen White Coal & Lumber Company.

The following table shows the destination of these shipments, and the amounts shipped to each point by the plaintiff and from the mines of the Altoona and Glen White Companies:

Destination of shipments.	Amount shipped. Mitchell Company shipments.	Shipments from Altoona Co.'s mines. Altoona.	Columbia.	Shipments from Glen White Co.'s mines.
	Tons.	Tons.	Tons.	Tons.
Bellefonte	42	....	....	45
Catasauqua	2,289	....	152	..
Harrisburg	137	....	36	..
Parryville	3,069	....	2,966	..
Philadelphia	558	....	471	..
Totals....	6,095	....	3,625	45

All the coke shipped from the mines of the Altoona Coal & Coke Company was shipped by the Columbia Company. The shipments shown above made by the Columbia Company from the mines of the Altoona Coal & Coke Company embraced coke purchased by that company f. o. b. the mines of the Altoona Coal & Coke Company, and the coke shipped from the mines of the Glen
58 White Coal & Lumber Company was shipped by purchasers f. o. b. the mines from that company.

The title to the coke thus purchased by the Columbia Company and the purchasers from the Glen White Company passed to the purchasers at the mines, and the transportation of the same by the defendant was accordingly made for their account. The freights on the coke were paid by the Columbia Company and the other purchasers, and they received no portion of any payment made by the defendant to either the Altoona Coal & Coke Company or the Glen White Coal & Lumber Company for services rendered in the transportation of the coal, or on any other account.

The coke shown in the above statement could have been shipped to all the destinations to which it moved by more than one route, with the exception of that shipped to Bellefonte. There is no evidence showing the route or routes by which any of this coke was transported.

8. The defendant divided the coal and coke producing territory tributary to its lines into various regions or districts; the lines of these districts were not coincident as between coal and coke.

The mines of the plaintiff and those of the Altoona Coal & Coke Company and of the Glen White Coal & Lumber Company, considered as producers of coal, and with reference to rates on coal, were all located within the territory included in and designated by the defendant as the Clearfield District. The mines of the two last named companies were nearer than the plaintiff's mines to the markets or destinations to which all the coal of the plaintiff included in this action was shipped.

The mines of the Latrobe Coal Company, the Millwood Coal & Coke Company and the Bolivar Coal & Coke Company, regarded as producers of coal, were all located within the district designated by the defendant as the Latrobe District. This district was
59 west of the Clearfield District, and was, consequently, further removed from the markets or destinations to which the plaintiff's shipments were made.

The mines of the plaintiff and of the Altoona Coal & Coke Company and the Glen White Coal & Lumber Company, regarded as producers of coke, were located within the district known and designated as the Gallitzin or Mountain District, and the mines of the Latrobe Coal Company and the Bolivar Coal & Coke Company (the Millwood Coal & Coke Company producing no coke), were located within the district known and designated as the Latrobe District. The mines of the Bolivar Coal & Coke Company were the easternmost operation in the Latrobe District, and were, consequently, but a few miles west of the territory embraced in the Gallitzin or Mountain District.

9. Prior to April 1st, 1899, the defendant's rates on coal to all points within the State of Pennsylvania east of Lewiston Junction were fifteen cents per ton higher from the Latrobe District than from the Clearfield District.

On December 3, 1900, the rates on coal from the Latrobe region to points within the State of Pennsylvania east of the Philadelphia, Erie & Northern Central Railroad lines between Williamsport and Baltimore, were made the same as the rates from the Clearfield District.

The rates on coke to all points within the State of Pennsylvania east of Lewistown Junction, were during the period of the action 20 cents higher from the Latrobe District than from the Gallitzin or Mountain District.

10. The mines of the Altoona Coal & Coke Company and of the Glen White Coal & Lumber Company were not located immediately upon the defendant's railroad, but were located on short branches belonging to these companies, respectively, both of which connected with the railroad of the defendant at a point west of Altoona, known as Kittanning Point.

60 The branch on which the mines and ovens of the Altoona Coal & Coke Company were located was between four (4) and five (5) miles long, having a maximum gradient of about four (4)

per cent., and the branch on which the Glen White Coal & Lumber Company's operations were located was about three (3) miles long with a maximum gradient of about three (3) per cent. The operations of the Altoona Coal & Coke Company were located at a point about 800 feet higher than the point of junction of the branch with the defendant's railroad, and the average grade, therefore, of the branch was between 160 and 200 feet to the mile.

To enable the altitude to be the more readily overcome the operation of the branch was conducted by and through a series of back switches, three in number.

Due to the lesser altitude which had to be overcome on the branch leading to the operations of the Glen White Coal & Lumber Company, no back switches were used on that branch, but the grades were heavy.

On both branches the curvature was very sharp.

The grade and curvature on these branches operated to materially control and restrict the number of cars that could be moved with safety at one time over the same. Dependent upon the weather conditions the number that could be safely moved varied from four to six, and the time consumed in the movement, because of such grades and curvature, of each draft of cars was about four times as great as would have been consumed in the movement of the same number of cars the same distance over a comparatively level line.

Due to these conditions it was impracticable for the defendant to deliver empty cars at the mines and ovens of these two companies and to haul the loaded cars therefrom in the manner that it was able to perform a like service at operations located directly on its
61 track or separated therefrom by short spurs or sidings offering no physical operating difficulties.

If the defendant had itself undertaken to operate these branches it would have been necessary from an operating standpoint to dispatch two engines and crews in the morning from Altoona, and to have kept these engines and crews working on these branches throughout the day and to have then returned them to Altoona for the night.

At operations on the defendant's railroad where no such physical difficulties existed as those affecting the operation of these branches, no special assignment of an engine was necessary, the work of delivering the empty cars at the mines or ovens and of hauling the loaded ones therefrom being performed by the road engine of the train which had brought these cars to the junction of the mine branch with the railroad, or which would haul the train in which the loaded cars would be carried from such junction, the trains themselves being halted at the junction while this work was being performed.

The mines of the Millwood Coal & Coke Company were located on a narrow-gauge railroad about two and one-half (2½) miles long. Due to the fact that it was not of the standard gauge it was impracticable for the defendant to deliver the empty cars at the mines and to take the loaded ones therefrom in the manner in which this service was performed at other operations. As in the case of the branches leading to the Altoona Coal & Coke Company and the Glen White

Coal & Lumber Company operations, a special assignment of an engine would have been necessary, and in this case of cars also.

The mines and ovens of the Latrobe Coal Company were located on a short branch or spur about three-fourths (¾) of a mile long, having no unusual grades or curvature.

The operations of the Boliver Coal & Coke Company were located on a spur or short branch about one-third (⅓) of a mile in length, which offered no unusual physical operative difficulties.

62 The various operations of the plaintiff were located on short spurs or sidings none of which offered any difficulties in the way of operation due to length, grades, curvature or other conditions.

11. The physical characteristics of the branch or spur at the Gallitzin Mine of the plaintiff on the one hand, and of the branches or spurs connected with the mines of the Altoona Coal & Coke Company, the Glen White Coal & Lumber Company and the Millwood Coal & Coke Company, which would naturally be taken into consideration in determining the expediency of their operation by the defendant, were, during the period of the action, materially dissimilar.

The branch or spur at the Gallitzin Mine was materially shorter than any of the others, and was capable of being operated by and through the engines of the regular trains which transported over the defendant's railroad the cars to and from the junction of the railroad and the branch to the mine, while none of the other branches or spurs could be operated in this manner. The operation of the Gallitzin Branch was attended with but comparatively little risk of accident, due to the absence of any sharp curvature and steep grades, while both of these conditions were encountered in the operation of the branches to the Altoona Coal & Coke Company and the Glen White Coal & Lumber Company mines. While from twenty-five to forty loaded and an equal number of empty cars could be handled on the branch at Gallitzin in from two to four hours, the time consumed in handling the same number of cars on the branches to the Altoona and Glen White Companies' mines would have been from six to eight times as great, if the defendant had undertaken the operation of the same.

12. The defendant's tariff rates on coal and coke in force during the period of the action covered the transportation from the mines, and it was consequently bound to transport the loaded cars

63 from the mines and ovens and to deliver the empties thereat at all operations on its lines.

13. During the period of the action the defendant did not itself perform any service in connection with the transportation of empty and loaded cars over the branches on which the operations were located of the Altoona Coal & Coke Company, the Glen White Coal & Lumber Company and the Millwood Coal & Coke Company. By arrangement with these companies the transportation was conducted by them over their respective branches, and the defendant paid for the services thus performed in its relief the following compensation:

The payments to the Altoona Coal & Coke Company were ascertained and determined as follows: It was allowed eighteen (18) cents per gross ton on all coal transported by it over its branch to the junction with the defendant's railroad which was destined to points east

of Altoona or south of Hollidaysburg, and thirteen (13) cents per gross ton on coal thus transported destined to points intermediate between those named and its mines and twenty (20) cents per net ton on coke transported by it when destined to points east of Altoona or south of Hollidaysburg and ten (10) cents per net ton on coke so transported when destined to points intermediate between those named and its mines. Such payments covered services rendered in the transportation of empty cars. No payments were made for the transportation of coal purchased by the defendant company for its own use.

The payments to the Glen White Coal & Lumber Company were ascertained and determined as follows: It was allowed fifteen (15) cents per gross ton on all coal and fifteen (15) cents per net ton on all coke transported by it over its branch to the junction with the defendant's railroad. Such payments also covered services rendered by it in the transportation of empty cars.

The payments to the Millwood Coal & Coke Company were ascertained and determined as follows: It was allowed prior to
64 March 31, 1899, fifteen (15) cents per gross ton, and subsequent thereto ten (10) cents per gross ton on all coal transported by it over its branch to the junction with the defendant's railroad. Such payments covered services rendered by it in the transportation of empty cars.

14. During the period of the action the Latrobe Coal Company owned a small engine which it used in moving loaded and empty cars between its mines and ovens and the junction of its spur or branch with the defendant's railroad. This service was not exclusive of a similar service by the defendant. As compensation therefor, and for trackage, the defendant allowed the Latrobe Coal Company during the period of the action ten (10) cents per gross ton on coal and ten (10) cents per net ton on coke which was transported over its branch.

15. The Boliver Coal & Coke Company rendered no services in the movement of cars loaded or empty over the spur or branch on which its operations were located. The defendant during the period of the action made an allowance to it of fifteen (15) cents per net ton on coke shipped from its mines to points east thereof. This allowance was induced by the fact that it was represented to the defendant that because of conditions which made the production of coke by the Boliver Company expensive its operations could not be conducted at a profit unless it was given a rate of freight more nearly approximating that in force from the Gallitzin or Mountain District, the Boliver Company's operations being the first west of the territory embraced within that district. The allowance of fifteen (15) cents did not put the Boliver Company on an equality with the companies shipping from the Mountain District, but still left the rate paid by it five (5) cents per ton higher than the rates in force from the mines located in the Mountain District.

16. During the period of the action the defendant itself performed the services of moving the empty and loaded cars
65 between its railroad and the mines and ovens at all of the plaintiff's operations, with the exception of the mines of the

plaintiff located at Gallitzin. At that mine the plaintiff between October 1st, 1899, and April 30, 1901, excepting for an interval of about four weeks, performed this service itself. This was not done at the instance or desire of the defendant, but was undertaken by the plaintiff with the purpose of enabling it to perform the service in a manner more satisfactory to itself, and also to make demand upon the defendant for compensation for the services rendered. The service of the defendant which was thus displaced was of the same character as, and in all respects equal to, that which it was rendering at other mines and to other shippers similarly situated. Prior to the time at which the plaintiff undertook to perform this service, it had used horses in order to perform services which it was not the practice of the railroad either at this or any other mine to perform. After it had secured the engine necessary for the performance of the service which the defendant has been performing, it dispensed with these horses and performed the service theretofore performed by their use by means of the engine.

The service which the defendant performed at Gallitzin consumed from two to four hours, dependent upon the number of cars handled, and involved the movement of from fifty to eighty cars loaded and empty daily, and was performed by the engines which moved the trains in which the cars were transported over the defendant's railroad to and from the plaintiff's operations. It does not appear what saving to the defendant, if any, in the cost of moving cars to and from the plaintiff's operations at Gallitzin resulted from the partial performance of the service by the plaintiff.

17. Prior to April 1st, 1900, shipments of coal and coke were, in many instances, not made at the tariff rates, but at rates quoted by the defendant to shippers upon their application, and it ap-
66 pears from the testimony of the president of the plaintiff that it was his practice to arrange with the defendant for the rates on the shipments made by his company, and that during the years 1898 and 1899 and up to some time in 1900 shipments were made by his company under the rates secured in this way, and very little attention was paid to the open or tariff rate.

The plaintiff has not shown what rates in point of fact it paid on the shipments made by it during the period when the quoted rates and not the tariff rates governed.

18. The shipments made from the mines of the Altoona Coal & Coke Company, the Glen White Coal & Lumber Company, the Millwood Coal and Coke Company, the Latrobe Coal Company and the Boliver Coal & Coke Company were transported during the period of the action at tariff rates with very few exceptions. On all shipments transported from the mines of these companies after March 1st, 1898, to points and in months to and in which the defendant transported any of the plaintiff's shipments, the tariff rate was paid, and no settlements or deductions therefrom were subsequently made or allowed.

19. During the period of the action (four years and one month) the aggregate payments made by the defendants to the Altoona Coal & Coke Company, the Glen White Coal & Lumber Company, the

Millwood Coal & Coke Company, the Latrobe Coal Company and the Bolivar Coal & Coke Company, both for services rendered by them in the transportation of coal and coke in relief of the defendant, and in adjustments of rates as between open or tariff rates and quoted rates, including coal and coke shipped to points within as well as without the state, amounted to the following sums:

67

	Amount.
Altoona Coal & Coke Company	$48,134.60
Glen White Coal & Lumber Company	27,790.28
Millwood Coal & Coke Company	2,742.25
Latrobe Coal Company	30,494.75
Bolivar Coal & Coke Company	1,951.67

20. In the early part of the year 1898 the plaintiff learned that the defendant was paying the Altoona Coal & Coke Company and the Glen White Coal & Lumber Company for the services rendered by them in transporting cars empty and loaded over their branch lines, and it was the knowledge of this fact which induced it in part to secure an engine and to perform the service at its Gallitzin mine which it afterwards performed. The plaintiff did not, so far as the evidence discloses, make complaint to the defendant concerning the payments thus made to the Altoona Coal & Coke Company and the Glen White Coal & Lumber Company, nor did it ever make any claim that such payments in any wise amounted to discrimination against it.

21. The defendant rendered weekly bills to the plaintiff for freights due by it, and there is no evidence to the effect that the payment of those was ever accompanied with any protest or objection upon the part of the plaintiff due to the fact that the defendant was making payments to the Altoona Coal & Coke Company and the Glen White Coal & Lumber Company for the services rendered in transporting cars over their branches.

22. A very large proportion of the shipments from the mines of the Altoona Coal & Coke Company, the Glen White Coal & Lumber Company and the Latrobe Coal Company embraced coal and coke which had been purchased from these companies by others, to whom, as the result of the terms and conditions of the purchase, title
68 to the coal and coke passed at the mines. The freights on this purchased coal and coke were paid by the purchasers, who received no benefit from any payments made by the defendants to their vendors or sellers, the latter receiving and retaining all such payments. In the case of the Altoona Coal & Coke Company between some time in 1899 down to the end of the period embraced in the action, about 90 per cent. of its coke and about 5 per cent. of its coal was sold upon these terms to one purchaser, and of what remained a portion—how much does not appear—was sold upon similar terms to other purchasers by whom the shipments were made and the freight paid. In the case of the Glen White Coal & Lumber Company, practically all of its output was sold to purchasers, to

whom title passed at the mines, and who paid the freight on the shipments. And in the case of the Latrobe Company all the shipments made from its mines since July, 1900, were made by purchasers, who took delivery at the mines, and who paid the freights. Some also of the shipments from the Millwood Coal & Coke Company's mines were made by such purchasers.

69 Common Pleas No. 3 of the County of Philadelphia, March Term, 1905.

No. 543.

MITCHELL COAL & COKE COMPANY
v.
PENNSYLVANIA RAILROAD COMPANY.

Defendant's Requests for Conclusions of Law.

The Referee is requested, upon behalf of the defendant, to find as follows:

I. The burden is upon the plaintiff to prove all the facts, which must be shown in order to establish a case of inequality of charge by the defendant, violative of the obligation in respect thereto imposed upon it by the Act of June 4, 1883.

II. The plaintiff has not shown what rates of freight it paid on the shipments, in respect to which it claims a right to recover. Its failure so to do is fatal to a recovery on its part as to any of such shipments.

III. The plaintiff has not shown that it sustained any damages or injuries because of any payments made by the defendant to other shippers, and it is not, therefor-, entitled to recover in this action.

IV. The obligation of the defendant to the plaintiff in respect to equality of rates was complied with, if it did not charge it a higher rate for the carriage of its shipments to any destination than it charged another shipper for the carriage at the same time of a like shipment to the same destination via the same route or line.

V. Services are not "like," within the meaning of the Act of June 4, 1883, which are rendered in the transportation of like traffic from the same point to different destinations or from the same point to the same destination if the routes by which the traffic moves in the case last put are substantially different. There must be substantial identity of destination and of route.

70 VI. The defendant would not have violated nor ignored any obligation or duty imposed upon it by the Act of 1883, or otherwise, by carrying at different rates of freight from the same point of origin to the same destination by or via different routes. And especially is this true when by one of such routes the transportation would have been exclusively over its own lines, while by the other it would have been over a through line made up in part of its own line and in part of the line of another carrier.

VII. Services are not like, nor are they rendered under like conditions and under similar circumstances, within the meaning of the Act of 1883, which are not being performed by the carrier at one and the same time, and services not actually contemporaneous cannot be treated and regarded as such because rendered within a period during which no change was made by the carrier in its tariff rates, nor because, though tendered at different dates, the carrier was in the interval regularly and constantly engaged in transporting to other destinations the shipments of both shippers.

VIII. During the period of the action the defendant was not required by law to publish rates to points within the State, nor was non-observance of its rates forbidden, unless such non-observance would result in an inequality of charge to shippers, prohibited by law.

IX. Even, therefore, if any of the payments of which the plaintiff complains were to be treated and regarded as concessions in rates and not as payments for services rendered, the fact of their payment does not of itself entitle the plaintiff to recover. It can only recover in the event that thereby an inequality of charge came about or resulted, forbidden by the Act of 1883, to the disadvantage or injury of the plaintiff. Unless, by or through the receipt of such
71 payment, the shipper to whom it was made secured from the defendant transportation for shipments at a lower charge than the plaintiff was charged for the carriage of its shipments to the same destination via the same line or route at the same time, and damage to the plaintiff resulted therefrom, the defendant by such payment did no injury to the plaintiff and incurred no liability to it.

X. The burden is upon the plaintiff to prove that the payments made, were, in fact, rebates or allowances from the rates in force at the time, and were not payments for services rendered, or on other accounts. The presumption is that they were lawful payments.

XI. The defendant is not, and was not during the period of the action, forbidden from making use of the services of a shipper in the performance of some duty connected with or devolving upon it in respect of the transportation of traffic for his or its account, and for services thus rendered in its relief, it could lawfully make compensation.

XII. The fact that the defendant made arrangements with one or more shippers under and by virtue of which these shippers transported empty and loaded cars over the branches or spurs intervening between their mines and the defendant's railroad, and were paid for so doing, did not impose upon the defendant an obligation or duty to enter into similar arrangements with all other shippers, even though they were in a position to render services similar in all respects to those rendered by the shippers with whom such arrangements were made.

XIII. The arrangements entered into by the defendant with the Altoona Coal and Coke Company, the Glen White Coal and Lumber Company and the Millwood Coal and Coke Company, and the payments made thereunder did not create or impose upon the defendant

any obligation to enter into a similar arrangement with the
72 plaintiff in respect to the transportation or handling of cars over branches or spurs at any of its mines, and its refusal to make such an arrangement was not a violation of any duty which it owed to the plaintiff.

XIV. Even if the defendant, because of the arangements, to which it was a party, for the operation of their respective branches by the Altoona Coal and Coke Company, the Glen White Coal and Lumber Company and the Millwood Coal and Coke Company, thereby imposed upon itself an obligation to make similar arrangements with shippers able and willing to render services similar in character to those rendered by the three companies named, such obligation was not imposed in respect to the plaintiff, because of the substantial dissimilarity of circumstances and conditions affecting the operation thereof, between the branches or spurs at its mines and those at the mines of the other companies. The voluntary action, therefore, of the plaintiff in itself undertaking to handle cars over its branch or spur at its Gallitzin Mine, even though this may have resulted (although there is no proof of this) in a saving to the defendant, did not create any claim on its part legally enforceable against the defendant.

XV. Even if the payments of ten (10) cents and fifteen (15) cents per ton, respectively, made by the defendant to the Latrobe Coal Company and to the Bolivar Coal and Coke Company are to be treated and regarded as concessions in or adjustments of rates, and not as payments for services rendered, the defendant, by such payments, did not violate any obligation which it owed to the plaintiff, even as to its shipments which were like and contemporaneous with those with respect to which such payments were made, unless these latter shipments were, as the result of such payments, carried for a lower charge than the plaintiff was obliged to pay. As the evidence is undisputed that during the period of the action the de-
73 fendant's rates on coke for the Latrobe district, in which were located the operations of the Latrobe and Bolivar Companies, were to all eastern points, twenty (20) cents per ton higher than from the plaintiff's operations, which were all in the Clearfield district, the Latrobe Company and the Bolivar Company were still charged ten (10) and five (5) cents per ton, respectively, more than the plaintiff was charged on its shipments of coke to the same destination, assuming that it was charged the tariff rate.

And as the evidence is also undisputed that prior to December 3, 1900, the rates on coal from the Latrobe Company's mines (no payments were made to the Bolivar Company) were fifteen (15) cents per ton higher than from the plaintiff's mines to all points within the State of Pennsylvania, and that after December 2, 1900, and down to the end of the period covered by the action they continued to be fifteen (15) cents per ton higher to all points within the State west of the line drawn between Williamsport and Baltimore, coincident with the lines of the Philadelphia and Erie and Northern Central Railroads, on shipments made to points and in the period to and in which these higher rates prevailed the charge paid by the Latrobe

Company, notwithstanding the payments to it of the ten (10) cents per ton, was still five (5) cents per ton in excess of that paid by the plaintiff on its shipments to similar points, during the same period, assuming that it was charged the tariff rate.

The plaintiff accordingly has no claim against the defendant in respect to any of its coke shipments, or of its coal shipments on which the tariff or open rate was fifteen (15) cents per ton less than the rate from the Latrobe Company's mines, because of these shipments to the Latrobe and Bolivar Companies.

XVI. Before any payment made by the defendant to either the Altoona Coal and Coke Company, the Glen White Coal and
74 Lumber Company, the Millwood Coal and Coke Company, the Latrobe Coal Company or the Bolivar Coal and Coke Company can be treated or regarded as a rate adjustment or concession, it must appear that the recipient of such payment thereby secured the carriage of the shipments at a lower rate of freight than would otherwise have been the case. Payments, therefore, which were made to any of the companies named on account or in respect of coal and coke which was not shipped by them, but was shipped from their mines by others who had purchased the same at the mines, and who paid the tariff rate of freight thereon, cannot be regarded or treated as having affected in any way the rate of freight paid by such purchaser in the absence of evidence (and there is no such evidence) that the recipients of such payment paid or in some way accounted to such purchaser for a portion or all of the same thus received by them.

XVII. No testimony has been adduced which relieves the plaintiff from the bar of the statute of limitations as affecting all shipments made by it prior to March 1, 1899, and apart, therefore, from any other consideration the plaintiff cannot recover damages in respect to shipments made by it prior to that date.

XVIII. Payments of freight made by the plaintiff were made voluntarily, and, so far as appears from the evidence, without protest. They were made with knowledge of the fact that payments, of which it now complains, were being made by the defendant to the Altoona Coal and Coke Company and the Glen White Coal and Lumber Company, and with the further knowledge that adjustments of rates were being made with shippers generally. Under these circumstances it cannot recover any portion of the payments thus made by it.

XIX. The plaintiff is not entitled to recover in respect to
75 shipments made under rates specially contracted for, because other shippers may have been able to secure from the defendant still more advantageous rates on like or contemporaneous shipments.

XX. The acceptance by the plaintiff of the sums paid to it by the defendant in settlement of rate adjustments or concessions previously agreed upon, operate to release the latter from all claims of the plaintiff for adjustments or concessions on the rates in respect to which such payments were made and received.

76 Court Common Pleas No. 3 of the County of Philadelphia, March Term, 1905.

No. 543.

MITCHELL COAL & COKE COMPANY
vs.
PENNSYLVANIA RAILROAD COMPANY.

Findings of Fact.

* * * * * * *

53. From April 1, 1897, to May 1, 1901, the Pennsylvania Railroad Company, in addition to paying the difference between the open published rates and the net quoted rates, also paid to the Altoona Coal & Coke Company on shipments from its mines and ovens to Altoona and points on the Hollidaysburg branch of the Pennsylvania Railroad a drawback of 13 cents for each gross ton of coal and 10 cents for each net ton of coke.

54. From April 1, 1897, to May 1, 1901, the Pennsylvania Railroad Company, in addition to paying the difference between the open published rates and the net quoted rates, also paid to the Glen White Coal & Lumber Company on shipments from its mines and ovens to Altoona and points on the Hollidaysburg branch of the Pennsylvania Railroad a drawback of 15 cents for each gross ton of coal and 15 cents for each net ton of coke.

55. From April 1, 1897, to May 1, 1901, the Pennsylvania Railroad Company, in addition to paying the difference between the open published rates and the net quoted rates, also paid to the Altoona Coal & Coke Company a drawback of 18 cents for each gross ton of coal and 20 cents for each net ton of coke mined and shipped from the said company's mines to points within the State of Pennsylvania, south of Hollidaysburg or east of Altoona, regardless of the time of shipment, the point of destination, and whether the coal was sold by the said company at a delivered price, freight prepaid or f. o. b. at the mines, and whether or not the said company was the shipper of the coal and coke.

56. From April 1, 1897, to May 1, 1901, the Pennsylvania Railroad Company, in addition to paying the difference between the open published rates and the net quoted rates, also paid to the
77 Glen White Coal & Lumber Company a drawback of 15 cents for each gross ton of coal and 15 cents for each net ton of coke mined and shipped from the said company's mines to points within the State of Pennsylvania, south of Hollidaysburg or east of Altoona, regardless of the time of shipment, the point of destination, and whether the coal was sold by the said company at a delivered price, freight prepaid, or f. o. b. at the mines, and whether or not the said company was the shipper of the coal and coke.

57. From April 1, 1897, to May 1, 1901, the Pennsylvania Rail-

road Company, in addition to paying the difference between the open published rates and the net quoted rates, also paid to the Latrobe Coal Company a drawback of 10 cents for each gross ton of coal and 10 cents for each net ton of coke mined and shipped from the said company's mines to points within the State of Pennsylvania, south of Hollidaysburg or east of Altoona, regardless of the time of shipment, the point of destination, and whether the coal was sold by the said company at a delivered price, freight prepaid, or f. o. b. at the mines, and whether or not the said company was the shipper of the coal and coke.

58. From April 1, 1897, to May 1, 1899, the Pennsylvania Railroad Company, in addition to paying the difference between the open market rates and the net quoted rates, also paid to the Millwood Coal & Lumber Company a drawback of 15 cents for each gross ton of coal, and from April 1, 1899, to May 1, 1901, a drawback of 10 cents for each gross ton of coal mined and shipped from the said company's mines during the periods aforesaid, regardless of the time of shipment, points of destination, and whether the coal was sold at a delivered price, freight prepaid, or f. o. b. at the mines and who was the shipper of the coal.

59. From April 1, 1897, to May 1, 1901, the Pennsylvania
78 Railroad Company, in addition to paying the difference between the open published rates and the net quoted rates, paid to the Bolivar Coal & Coke Company a drawback of 15 cents for each net ton of coke shipped from the said company's mines to points within the State of Pennsylvania, regardless of the time of shipment, points of destination, and whether the coke was sold at a delivered price, freight prepaid, or f. o. b. at the mines, and who was the shipper of the coke.

60. From April 1, 1897, to May 1, 1901, the Pennsylvania Railroad Company did not pay to the Mitchell Coal & Coke Company any drawback whatsoever except the difference between the published and quoted rates.

61. The drawbacks, other than the difference between the published and quoted rates, were paid under various names and disguises, such as "lateral al-owance" and "trackage." That they were paid as well as the amounts thereof, were deliberately concealed from the Mitchell Coal & Coke Company by the Pennsylvania Railroad Company.

62. The Mitchell Coal & Coke Company was misled by the misrepresentations of the officials of the Pennsylvania Railroad Company, made with the intention of preventing the Mitchell Coal & Coke Company from ascertaining the fact of the payment of drawbacks other than the difference between the published and quoted rates.

63. The Mitchell Coal & Coke Company, by its officers, made diligent efforts to ascertain whether any drawbacks or other forms of advantage in the payment of money or otherwise, which that company did not receive, were being given by the Pennsylvania Railroad Company to the Altoona Coal & Coke Company, Glen White Coal & Lumber Company, Millwood Coal & Lumber Company,

Bolivar Coal & Coke Company and Latrobe Coal Company, or any of them, but the officials of the Pennsylvania Railroad Company deliberately shut off all avenues of information on this point, and fraudulently told the officers of the Mitchell Coal & Coke Company that none of the said other companies obtained or would obtain any advantage and that the Mitchell Coal & Coke Company would be notified of any reduction in rates made to any of these companies. At the time when such statements were made, drawbacks under various forms and disguises were being paid to the said companies, and continued to be paid until after May 1, 1901.

* * * * * * *

79 68. The service rendered from April 1, 1897, to May 1, 1901, by the Pennsylvania Railroad Company to the Altoona Coal & Coke Company and the Glen White Coal & Lumber Company in the transportation of coal and coke for those companies, upon which drawbacks were paid, was a like service, from the same place, upon like conditions and under substantially similar circumstances as the service performed for the Mitchell Coal & Coke Company in the transportation for that company of coal and coke, upon which no drawback was paid.

69. The service rendered from April 1, 1899, to May 1, 1901, by the Pennsylvania Railroad Company to the Latrobe Coal Company, the Millwood Coal and Lumber Company and the Bolivar Coal & Coke Company in the transportation of coal for those companies, upon which drawbacks were paid, was a like service, from the same place, upon like conditions and under substantially similar circumstances as the service performed for the Mitchell Coal & Coke Company in the transportation for that company of coal, upon which no drawback was paid.

70. The drawbacks, other than the difference between the published freight rates and the quoted rates, paid by the Pennsylvania Railroad Company to the Altoona Coal & Coke Company, the Glen White Coal & Lumber Company, the Latrobe Coal Company, the Millwood Coal & Lumber Company and the Bolivar Coal & Coke Company, were intended by the Pennsylvania Railroad Company to be, and were, unjust and unreasonable discriminations by the said railroad company in favor of the said coal companies and against the Mitchell Coal & Coke Company, in charges for the transportation of coal and coke within the State of Pennsylvania.

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80 Court Common Pleas No. 3 of the County of Philadelphia, March Term, 1905.

No. 543.

MITCHELL COAL & COKE COMPANY
vs.
PENNSYLVANIA RAILROAD COMPANY.

Exceptions to Findings of Fact.

1. The Referee has erred in finding as follows:
"24. There was only one published freight rate for coal shipped from all mines in the Clearfield region to any given point."
2. The Referee has erred in finding as follows:
"25. There was only one published freight rate for coke shipped from all mines in the Clearfield region to any given point."
3. The Referee has erred in finding as follows:
"26. There was only one published freight rate for coal shipped from all mines in the Latrobe region to any given point."
4. The Referee has erred in finding as follows:
"27. There was only one published freight rate for coke shipped from all mines in the Latrobe region to any given point."
5. The Referee has erred in finding as follows:
"28. From April 1, 1897, to May 1, 1899, the published freight rates on coal shipped from the Latrobe region were 10 cents per gross ton higher; and from April 1, 1897, to May 1, 1901, the published freight rates from the Latrobe region on coke were 20 cents per net ton higher than the rates from the Clearfield region to eastern points within the State of Pennsylvania."

81 6. The Referee has erred in finding as follows:
"29. From April 1, 1899, to May 1, 1901, the freight rates were the same on coal shipped from the Clearfield and Latrobe regions to the same eastern markets within the State of Pennsylvania."
7. The Referee has erred in finding as follows:
"30. Upon all shipments of coal and coke from the Clearfield and Latrobe regions over the lines of the Pennsylvania Railroad and its branches, to points within the State of Pennsylvania, from April 1, 1897, to April 1, 1899, the Pennsylvania Railroad Company furnished to any shipper making application therefor, a net rate, which was less than the open published tariff rate to the point to which such shipments were to be made, except that from April 1, 1897, to March 14, 1899, the Mitchell Coal & Coke Company shipped at the published tariff rates 22,028 tons of coal and 5,754 tons of coke, and from March 14, 1899, to April 1, 1899, 915 tons of coal and 340 tons of coke."
8. The Referee has erred in finding as follows:
"31. From April 1, 1897, to April 1, 1899, the Altoona Coal & Coke Company, the Glen White Coal & Lumber Company, the

Latrobe Coal Company, the Millwood Coal & Lumber Company and the Bolivar Coal & Coke Company obtained from the Pennsylvania Railroad Company rates for all their shipments of coal and coke to points within the State of Pennsylvania to which the Mitchell Coal & Coke Company obtained like rates for shipments made by it, which rates were less than the published tariff rates, and the difference the Pennsylvania Railroad Company paid to the company making the shipment."

82 9. The Referee has erred in finding as follows:

"40. The Altoona Coal & Coke Company had from April 1, 1897, to May 1, 1901, a siding or branch railroad running from the main line of the Pennsylvania Railroad at Kittanning Point, Pennsylvania, to the mines of the Altoona Coal & Coke Company, a distance of approximately 3 miles, over which empty cars were drawn from the main line of the Pennsylvania Railroad tracks to the mines of the Altoona Coal & Coke Company, and loaded cars of coal and coke were drawn from the mines of the Altoona Coal & Coke Company to the main line of the Pennsylvania Railroad."

10. The Referee has erred in finding as follows:

"51. The work done by the Mitchell Coal & Coke Company at Gallitzin Colliery, from October 1, 1899, to May 1, 1901, was substantially similar service to that done by the Altoona Coal & Coke Company and the Glen White Coal & Lumber Company in moving empty cars from the tracks of the Pennsylvania Railroad to the mines, and loaded cars from the mines to the tracks of the Pennsylvania Railroad."

Assignment of Error No. 1.

[11. The Referee has erred in finding as follows:

"53. From April 1, 1897, to May 1, 1901, the Pennsylvania Railroad Company, in addition to paying the difference between the open published rates and the net quoted rates, also paid to the Altoona Coal & Coke Company on shipments from its mines and ovens to Altoona and points on the Hollidaysburg branch of the Pennsylvania Railroad a drawback of 13 cents for each gross ton of coal and 10 cents for each net ton of coke."]

Assignment of Error No. 2.

[12. The Referee has erred in finding as follows:

83 "54. From April 1, 1897, to May 1, 1901, the Pennsylvania Railroad Company, in addition to paying the difference between the open published rates and the net quoted rates, also paid to the Glen White Coal & Lumber Company on shipments from its mines and ovens to Altoona and points on the Hollidaysburg branch of the Pennsylvania Railroad a drawback of 15 cents for each gross ton of coal and 15 cents for each net ton of coke."]

Assignment of Error No. 3.

[13. The Referee has erred in finding as follows:

"55. From April 1, 1897, to May 1, 1901, the Pennsylvania Rail-

road Company, in addition to paying the difference between the open published rates and the net quoted rates, also paid to the Altoona Coal & Coke Company a drawback of 18 cents for each gross ton of coal and 20 cents for each net ton of coke mined and shipped from the said company's mines to points within the State of Pennsylvania, south of Hollidaysburg or east of Altoona, regardless of the time of shipment, the point of destination, and whether the coal was sold by the said company at a delivered price, freight prepaid, or f. o. b. at the mines, and whether or not the said company was the shipper of the coal and coke."]

Assignment of Error No. 4.

[14. The Referee has erred in finding as follows:

"56. From April 1, 1897, to May 1, 1901, the Pennsylvania Railroad Company, in addition to paying the difference between the open published rates and the net quoted rates, also paid to the Glen White Coal & Lumber Company, a drawback of 15 cents for each gross ton of coal and 15 cents for each net ton of coke mined and shipped from the said company's mines to points within the State of Pennsylvania, south of Hollidaysburg or east of Altoona, regardless of the time of shipment, the point of destination, and whether
84 the coal was sold by the said company at a delivered price, freight prepaid, or f. o. b. at the mines, and whether or not the said company was the shipper of the coal and coke."]

15. The Referee has erred in finding as follows:

"57. From April 1, 1897, to May 1, 1901, the Pennsylvania Railroad Company, in addition to paying the difference between the open published rates and the net quoted rates, also paid to the Latrobe Coal Company a drawback of 10 cents for each gross ton of coal and 10 cents for each net ton of coke mined and shipped from the said company's mines to points within the State of Pennsylvania, south of Hollidaysburg or east of Altoona, regardless of the time of shipment, the point of destination, and whether the coal was sold by the said company at a delivered price, freight prepaid, or f. o. b. at the mines, and whether or not the said company was the shipper of the coal and coke."

Assignment of Error No. 5.

[16. The Referee has erred in finding as follows:

"58. From April 1, 1897, to April 1, 1899, the Pennsylvania Railroad Company, in addition to paying the difference between the open market rates and the net quoted rates, also paid to the Millwood Coal & Lumber Company, a drawback of 15 cents for each gross ton of coal, and from April 1, 1899, to May 1, 1901, a drawback of 10 cents for each gross ton of coal mined and shipped from the said company's mines during the periods aforesaid, regardless of the time of shipment, points of destination, and whether the coal was sold at a delivered price, freight prepaid, or f. o. b. at the mines, and who was the shipper of the coal."]

17. The Referee has erred in finding as follows:

"59. From April 1, 1897, to May 1, 1901, the Pennsyl-
85 vania Railroad Company, in addition to paying the difference between the open published rates and the net quoted rates, paid to the Bolivar Coal & Cake Company a drawback of 15 cents for each net ton of coke shipped from the said company's mines to points within the State of Pennsylvania, regardless of the time of shipment, points of destination, and whether the coke was sold at a delivered price, freight prepaid, or f. o. b. at the mines, and who was the shipper of the coke."

18. The Referee has erred in finding as follows:

"61. The drawbacks, other than the difference between the published and quoted rates, were paid under various names and disguises, such as 'lateral allowances' and 'trackage.' That they were paid, as well as the amounts thereof, were deliberately concealed from the Mitchell Coal & Coke Company by the Pennsylvania Railroad Company."

19. The Referee has erred in finding as follows:

"62. The Mitchell Coal & Coke Company was misled by the misrepresentations of the officials of the Pennsylvania Railroad Company, made with the intention of preventing the Mitchell Coal & Coke Company from ascertaining the fact of the payment of drawbacks other than the difference between the published and quoted rates."

20. The Referee has erred in finding as follows:

"63. The Mitchell Coal & Coke Company, by its officers, made diligent efforts to ascertain whether any drawbacks or other forms of advantage in the payment of money or otherwise, which that company did not receive, were being given by the Pennsylvania Railroad
86 Company to the Altoona Coal & Coke Company, the Glen White Coal & Lumber Company, Millwood Coal & Lumber Company, Bolivar Coal & Coke Company and Latrobe Coal Company, or any of them, but the officials of the Pennsylvania Railroad Company deliberately shut off all avenues of information on this point, and fraudulently told the officers of the Mitchell Coal & Coke Company that none of the said other companies obtained or would obtain any advantage and that the Mitchell Coal & Coke Company would be notified of any reduction in rates made to any of these companies. At the time when such statements were made, drawbacks under various forms and disguises were being paid to the said companies, and continued to be paid until after May 1, 1901."

21. The Referee has erred in finding as follows:

"68. The service rendered from April 1, 1897, to May 1, 1901, by the Pennsylvania Railroad Company to the Altoona Coal & Coke Company and the Glen White Coal & Lumber Company in the transportation of coal and coke for those companies, upon which drawbacks were paid, was a like service, from the same place, upon like conditions and under substantially similar circumstances as the service performed for the Mitchell Coal & Coke Company in the transportation for that company of coal and coke, upon which no drawback was paid."

22. The Referee has erred in finding as follows:

"69. The service rendered from April 1st, 1899, to May 1st, 1901, by the Pennsylvania Railroad Company to the Latrobe Coal Company, the Millwood Coal & Lumber Company and the Bolivar Coal & Coke Company, in the transportation of coal for these companies, upon which drawbacks were paid was a like service from the same place upon like conditions, and under substantially similar circumstances as the service performed for the Mitchell Coal & Coke
87 Company in the transportation for that company of coal, upon which no drawback was paid."

Assignment of Error No. 6.

[23. The Referee has erred in finding as follows:

"70. The drawbacks, other than the difference between the published freight rates and the quoted rates, paid by the Pennsylvania Railroad Company to the Altoona Coal & Coke Company, the Glen White Coal & Lumber Company, the Latrobe Coal Company, the Millwood Coal & Lumber Company and the Bolivar Coal & Coke Company, were intended by the Pennsylvania Railroad Company to be, and were unjust and unreasonable discriminations by the said railroad company in favor of the said coal companies and against the Mitchell Coal & Coke Company, in charges for the transportation of coal and coke within the State of Pennsylvania."]

24. The Referee has erred in finding as follows:

"71. If the Pennsylvania Railroad Company had allowed and paid to the Mitchell Coal and Coke Company upon its shipments of coal and coke to points in Pennsylvania, the same concessions in rates and drawbacks for each ton shipped, as the former company allowed and paid to the Altoona Coal and Coke Company and the Glen White Coal and Lumber Company upon their shipments of coal and coke to points in Pennsylvania, for the like service, from the same place, upon like conditions, under similar circumstances and during the same period of time the Pennsylvania Railroad Company would have allowed or paid to the Mitchell Coal and Coke Company the sum of thirty-four thousand eight hundred and twenty-two dollars and twenty cents ($34,822.20) in addition to all concessions and drawbacks, which were allowed or paid by the said rail-
88 road company to the Mitchell Coal and Coke Company on account of coal and coke shipped by the last named company from April 1, 1897, to March 1, 1899, and the additional sum of forty-five thousand six hundred and ninety-one dollars and seventy cents ($45,691.70) for or on account of coal and coke shipped by that company from March 1, 1899, to May 1, 1901."

25. The Referee has erred in not finding, as proven, the facts embodied in the following request submitted by the defendant:

"10. The mines of the Altoona Coal & Coke Company and of the Glen White Coal and Lumber Company were not located immediately upon the defendant's railroad, but were located on short branches belonging to these companies, respectively, both of which connected with the railroad of the defendant at a point west of Altoona, known as Kittanning Point.

"That branch on which the mines and ovens of the Altoona Coal

and Coke Company were located was between four (4) and five (5) miles long, having a maximum gradient of about four (4) per cent., and the branch on which the Glen White Coal and Lumber Company's operations were located was about three (3) miles long with a maximum gradient of about three (3) per cent. The operations of the Altoona Coal and Coke Company were located at a point about 800 feet higher than the point of junction of the branch with the defendant's railroad, and the average grade, therefore, of the branch was betwen 160 and 200 feet to the mile.

"To enable the altitude to be the more readily overcome the operation of the branch was conducted by and through a series of back switches, three in number.

"Due to the lesser altitude which had to be overcome on the
89 branch leading to the operations of the Glen White Coal and Lumber Company, no back switches were used on that branch, but the grades were heavy.

"On both branches the curvature was very sharp.

"The grade and curvature on these branches operated to materially control and restrict the number of cars that could be moved with safety at one time over the same. Dependent upon the weather conditions the number that could be safely moved varied from four to six, and the time consumed in the movement, because of such grades and curvature, of each draft of cars was about four times as great as would have been consumed in the movement of the same number of cars the same distance over a comparatively level line.

"Due to these conditions it was impracticable for the defendant to deliver empty cars at the mines and ovens of these two companies and to haul the loaded cars therefrom in the manner that it was able to perform a like service at operations located directly on its track or separated therefrom by short spurs or sidings offering no physical operating difficulties.

"If the defendant had itself undertaken to operate these branches it would have been necessary from an operating standpoint to dispatch two engines and crews in the morning from Altoona, and to have kept these engines and crews working on these branches throughout the day and to have then returned them to Altoona for the night.

"At operations on the defendant's railroad where no such physical difficulties existed as those affecting the operation of these branches no special assignment of an engine was necessary, the work of delivering the empty cars at the mines or ovens and of hauling the loaded ones therefrom being performed by the road engine of the train which had brought these cars to the junction of the mine branch with the railroad, or which would haul the train in which the loaded cars would be carried from such junction, the
90 trains themselves being halted at the junction while this work was being performed.

"The mines of the Millwood Coal and Coke Company were located on a narow gauge railroad about two and one-half (2½) miles long. Due to the fact that it was not of the standard gauge, it was impracticable for the defendant to deliver the empty cars at the mines and

to take the loaded ones therefrom in the manner in which this service was performed at other operations. As in the case of the branches leading to the Altoona Coal & Coke Company and the Glen White Coal and Lumber Company operations, a special assignment of an engine would have been necessary and in this case of cars also.

"The mines and ovens of the Latrobe Coal Company were located on a short branch or spur about three-fourths (¾) of a mile long, having no unusual grades or curvature.

"The operations of the Bolivar Coal and Coke Company were located on a spur or short branch about one-third (⅓) of a mile in length, which offered no unusual physical operative difficulties.

"The various operations of the plaintiff were located on short spurs or sidings, none of which offered any difficulties in the way of operation due to length, grade, curvature, or other conditions."

26. The Referee has erred in not finding as proven the facts embodied in the following request submitted by the defendant:

"12. The defendant's tariff rates on coal and coke in force during the period of the action covered the transportation from the mines, and it was consequently bound to transport the loaded cars from the mines and ovens and to deliver the empties thereat at all operations on its lines."

27. The Referee has erred in not finding as proven the
91 facts embodied in the following request submitted by the defendant:

"19. During the period of the action (four years and one month) the aggregate payments by the defendant to the Altoona Coal & Coke Company, the Glen White Coal & Lumber Company, the Millwood Coal & Coke Company, the Latrobe Coal Company and the Bolivar Coal & Coke Company, both for services rendered by them in the transportation of coal and coke in relief of the defendant, and in adjustments of rates as between open or tariff rates and quoted rates, including coal and coke shipped to points within as well as without the State, amounted to the following sums.

	Amount.
"Altoona Coal & Coke Company	$48,134.60
Glen White Coal & Lumber Company	27,790.28
Millwood Coal & Coke Company	2,742.25
Latrobe Coal Company	30,494.75
Bolivar Coal & Coke Company	1,951.67"

28. The Referee has erred in not finding as proven the facts embodied in the following request submitted by the defendant:

"20. In the early part of the year 1898 the plaintiff learned that the defendant was paying the Altoona Coal & Coke Company and the Glen White Coal & Lumber Company for the services rendered by them in transporting cars empty and loaded over their branch lines, and it was the knowledge of this fact which induced it in part to secure an engine and to perform the service at its Gallitzin mine which it afterwards performed. The plaintiff did not, so far as the evidence discloses, make complaint to the defendant concerning the

payments thus made to the Altoona Coal and Coke Company
92 and the Glen White Coal and Lumber Company, nor did it ever make any claim that such payments in any wise amounted to discrimination against it."

29. The Referee has erred in not finding as proven the facts embodied in the following request submitted by the defendant:

"21. The defendant rendered weekly bills to the plaintiff for freight due by it, and there is no evidence to the effect that the payment of these was ever accompanied with any protest or objection upon the part of the plaintiff due to the fact that the defendant was making payments to the Altoona Coal & Coke Company and the Glen White Coal & Lumber Company for the services rendered in transporting cars over their branches."

93 Court Common Pleas, No. 3, of the County of Philadelphia, March Term, 1905.

No. 543.

MITCHELL COAL & COKE COMPANY
vs.
PENNSYLVANIA RAILROAD COMPANY.

Exceptions to Findings of Law.

1. The Referee has erred in finding as follows:

"9. The 'same period of time' means the period during which a concession is made or a drawback is paid."

2. The Referee has erred in finding as follows:

"10. Where a railroad company, a common carrier, designates a certain region or contiguous territory as a particular district, from all parts of which, so far as its lines extend, it will transport property at the same rates, all parts of that district to which the lines run, are to be considered the same place in determining whether
94 or not the company has made an undue or unreasonable discrimination."

3. The Referee has erred in finding as follows:

"12. Any shipper, injured by an undue or unreasonable discrimination of a common carrier, is entitled to recover against such carrier, damages in treble the amount of the injury so suffered."

4. The Referee has erred in finding as follows:

"13. The measure of damages is the amount of concession or drawback which would have been allowed or paid to the shipper, if he were allowed or paid the same rate of concession or drawback, allowed or paid during the period of shipment, to the most favored shipper on like goods from the same place, to the same or substantially the same destination."

5. The Referee has erred in finding as follows:

"14. The measure of damages is the rate of drawback paid by the defendant to the Altoona Coal and Coke Company and the Glen White Coal and Lumber Company."

6. The Referee has erred in finding as follows:
"15. No part of the plaintiff's claim is barred by the statute of limitations."
7. The Referee has erred in finding as follows:
"16. The plaintiff is entitled to judgment against the defendant for three times the amount of the injury which the plaintiff sustained."
95 8. The Referee has erred in finding as follows:
"17. The injury sustained by the plaintiff from the undue and unreasonable discrimination of the defendant is eighty thousand five hundred and thirteen dollars and ninety cents ($80,513.90)."

Assignment of Error No. 7.

[9. The Referee has erred in not finding that the so-called lateral payments made by the defendant to the Altoona Coal & Coke Company, the Glen White Coal & Lumber Company, and the Millwood Coal & Coke Company were made for services rendered by these companies, respectively, in relief of the defendant and were consequently proper and lawful payments.]
10. The Referee has erred in not finding that the payments made by the defendant to the Latrobe Coal & Coke Company were made for trackage and other considerations and were consequently proper and lawful.
11. The Referee has erred in not finding that the defendant was justified in reducing the rate on coke from the operations of the Bolivar Coal & Coke Company to the extent of fifteen cents a ton to all points without thereby subjecting the plaintiff to any unjust or undue discrimination, and that as a consequence the payments made by the defendant to the Bolivar Coal & Coke Company of fifteen cents per ton in order to effect a reduction in the rate paid by it on its coke shipments was a proper and lawful one.
12. The Referee has erred in treating what the defendant did on January 1st, 1902, in respect to either changing or abolishing the payments made to the Altoona Coal & Coke Company, the Glen White Coal & Lumber Company, the Latrobe Coal Company, the Millwood Coal & Coke Company, the Bolivar Coal & Coke
96 Company, as amounting to evidence of the unlawfulness of the payments to these companies which had been made by the defendant during the period of the action.
13. The Referee has erred in not finding that the plaintiff's cause of action and consequent right of recovery in respect to payments made by the defendant either to the Altoona Coal & Coke Company, the Glen White Coal & Lumber Company, or the Millwood Coal & Coke Company is limited to shipments made by it from its Gallitzin mine between October 1, 1899, and May 1, 1901.
14. The Referee has erred in not finding that the plaintiff's cause of action and consequent right of recovery in respect to all its shipments excepting those made from its Gallitzin mine between October 1, 1899, and May 1, 1901, is limited to such claim, if any, as it could properly assert because of payments made by the defendant to

the Latrobe Coal & Coke Company and the Bolivar Coal & Coke Company.

15. The Referee has erred in not finding that the payments complained of in the action, made by the defendant to either the Altoona Coal & Coke Company, the Glen White Coal & Lumber Company, the Millwood Coal & Coke Company, the Latrobe Coal Company or the Bolivar Coal & Coke Company, did not subject the plaintiff to any discrimination forbidden by law and did not consequently injure it.

16. The Referee has erred in not finding that the defendant rendered a like service in the transportation of shipments of any other shipper to that which it rendered to the plaintiff in the transportation of its shipments only where the transportation was from
97 the same point to the same point, and via the same route, and the service performed was rendered during the same period of time.

17. The Referee has erred in not finding that because of the higher rates prevailing throughout the period of the action on coke from the mines of the Latrobe Coal & Coke Company and the Bolivar Coal & Coke Company, than from the operations of the plaintiff, the rates charged to and paid by these companies on shipments of coke made by them were greater than the rate paid by the plaintiff on all its shipments even though the so-called lateral payments made to these companies should be regarded and treated as tantamount to reductions in rates, and that as a consequence the plaintiff had no cause of action because of the payments thus made to these two companies, as the net rate paid by them was greater than that paid by the plaintiff.

18. The Referee has erred in not finding that because of the higher rates on coal which prevailed prior to December 3d, 1900, from the mines of the Latrobe Coal & Coke Company than from the operations of the plaintiff, the rates charged to, and paid by, that company on shipments of coal made by it was greater than the rate paid by the plaintiff on all its shipments prior to the date named, even though the so-called lateral payments made to the Latrobe Company could be regarded and treated as tantamount to a reduction in rates and that as a consequence the plaintiff had no cause of action because of the payments made to the Latrobe Company during this period as the net rate paid by it was greater than that paid by the plaintiff.

Assignment of Error No. 9.

[19. The Referee has erred in not finding that the plaintiff has no cause of action in respect to any of the shipments made by it after the fall of 1898, because it appeared from the evidence
98 that payments of the freights on these shipments were made voluntarily by the plaintiff unaccompanied by any protest against the right of the defendant to charge and collect the same, and with knowledge of the fact that lateral payments were being

made to the Altoona Coal & Coke Company and the Glen White Coal & Lumber Company.]

20. The Referee has erred in not finding that the plaintiff had no cause of action in respect to shipments made by it prior to March 1, 1899, because of the bar of the statute of limitations.

21. The Referee has erred in not finding that the plaintiff had no cause of action in respect to shipments made by it on which it paid less than the tariff rate.

22. The Referee has erred in not finding that there was no proof of any injury sustained by the plaintiff because of payments made by the defendant either to the Altoona Coal & Coke Company, the Glen White Coal & Lumber Company, the Latrobe Coal & Coke Company, the Millwood Coal & Coke Company, or the Bolivar Coal & Coke Company.

[23. The Referee has erred in not finding that no injury was sustained by the plaintiff in respect to shipments made by it to destinations to which shipments were not made by the companies receiving the payments which the plaintiff alleged subjected it to undue and unreasonable discrimination.]

24. The Referee has erred in not finding that no injury was sustained by the plaintiff in respect to such of his shipments as were transported by the defendant to destinations to which it did not contemporaneously transport shipments for the companies receiving the payments which the plaintiff alleged subjected it to undue and unreasonable discrimination.

25. The Referee has erred in not finding and reporting that judgment should be entered in favor of the defendant.

THE PENNSYLVANIA RAILROAD COMPANY,

(Sgd.) By J. B. THAYER, *Third Vice-President.*

FRANCIS I. GOWEN,
JOHN G. JOHNSON,
For Exceptants.

99 C. P. No. 3, Philadelphia County, March Term, 1905.

No. 543.

MITCHELL COAL & COKE COMPANY
vs.
PENNSYLVANIA RAILROAD COMPANY.

VIII. Report on Exceptions.

Subsequent to the argument upon the exceptions to the Referee's report the counsel for the respective parties filed on May 29, 1911, with the Referee certain tabulated statements which are returned herewith and a stipulation as to facts which the Referee pursuant to the said stipulation hereby finds in addition to the finding of facts in his report, namely:

1. That the tabulation or statement marked "Exhibit A," comprising forty-six sheets, embraces all shipments of coal made by the plaintiff here (excepting those made from its Gallitzin Colliery between October 1, 1899, and May 1, 1901) to destinations or points within the State of Pennsylvania to which a shipment or shipments were made at any time during the period of the action by either the Altoona Coal and Coke Company, the Glen White Coal and Lumber Company, the Latrobe Coal Company, the Millwood Coal and Coke Company or by the Columbia Coal Mining Company from
100 the mines of either of the four companies named, and also all shipments made by the five last mentioned companies to such destinations or points.

In all cases, the date and volume of shipments are shown by months, and where no figures appear opposite any month in any column which is headed by the name of one of the five above mentioned shippers, absence of such figures indicates that in that particular month the shipper in question made no shipments to the destination shown on the sheet.

On each sheet of the tabulation or statement is shown the tariff rates in force at the time and which were applicable to the shipments made by the several shippers whose shipments are noted on the sheet.

As shown on the several sheets, the tariff rates to a particular destination applicable to each shipper, in many instances vary during the period of the action, and it also appears that in many instances, where two or more shippers during any one month made shipments to any particular destination, that the rates applicable to one such shipper, varied as to the rate or rates applicable to such other shipper or shippers; and in other instances shipments were made by particular destinations in certain months during which no other shipper made such shipments, in which event the tariff rates that would have been applicable to such other shipments if made, are not given on said tabulation.

The shipments of the plaintiff embraced in the tabulation or statement aggregate 142,468 tons, of which 56,582 tons were shipped prior to March 1, 1899, and 85,886 tons after that date. Of these shipments 12,564 tons prior to March 1, 1899, and 73,794 tons after March 1, 1899, were made at the times when the other shippers made shipments at the tariff rates applicable to plaintiff's shipments.

The balance of plaintiff's shipments, to wit: 44,018 tons prior to March 1, 1899, and 12,092 tons after March 1, 1899, were
101 made at times, or in periods at or during which other shippers either did not make any shipments to a particular point, or else made shipments at tariff rates different than the tariff rates applicable to plaintiff's said shipments.

2. That the tabulation or statement marked "Exhibit B," comprising thirty sheets, embraces all shipments of coke made by the plaintiff herein (excepting those made from its Gallitzin Colliery between October 1, 1899, and May 1, 1901) to destinations or points within the State of Pennsylvania to which a shipment or shipments were made at any time during the period of the action by

either the Altoona Coal and Coke Company, the Glen White Coal and Lumber Company, the Latrobe Coal Company, the Bolivar Coal and Coke Company or by the Columbia Coal Mining Company from the mines of either of the four companies named, and also all shipments made by the five last mentioned companies to such destinations or points. In all cases, the date and volume of shipments are shown by months, and where no figures appear opposite any month in any column which is headed by the name of one of the five above mentioned shippers, absence of such figures indicates that in that particular month the shipper in question made no shipments to the destination shown on the sheet.

On each sheet of the tabulation or statement is shown the tariff rates in force at the time and which were applicable to the shipments made by the several shippers whose shipments are noted on the sheet.

As shown on the several sheets, the tariff rates to a particular destination applicable to each shipper, in many instances vary during the period of the action, and it also appears that in many instances, where two or more shippers during any one month made shipments to any particular destination, that the rates applicable to one such shipper, varied as to the rate or rates applicable to such shipper
102 or shippers; and in other instances shipments were made by particular shippers to particular destinations in certain months during which no other shipper made such shipments, in which event the tariff rates that would have been applicable to such other shipments if made, are not given on said tabulation.

The shipments of the plaintiff embraced in the tabulation or statement aggregate 166,445 tons, of which 87,593 tons were shipped prior to March 1, 1899, and 78,852 tons after that date. Of these shipments 19,061 tons prior to March 1, 1899, and 36,223 tons after March 1, 1899, were made at the times when the other shippers made shipments at the tariff rates applicable to plaintiff's shipments.

The balance of plaintiff's shipments, to wit: 68,532 tons prior to March 1, 1899, and 42,629 tons after March 1, 1899, were made at times, or in periods at or during which other shippers either did not make any shipments to a particular point, or else made shipments at tariff rates different than the tariff rates applicable to plaintiff's said shipments.

3. That the tabulation or statement marked "Exhibit C," comprising twenty-four sheets, embraces all shipments of coal made by the plaintiff herein from its Gallitzin Colliery between October 1, 1899, and May 1, 1901, to destinations or points within the State of Pennsylvania to which a shipment or shipments were made at any time during the period of the action by either the Altoona Coal and Coke Company, the Glen White Coal and Lumber Company, the Millwood Coal and Coke Company or by the Columbia Coal Mining Company from the mines of either of the three companies named, and also all shipments made by the four last mentioned companies to such destinations or points.

In all cases, the date and volume of shipments are shown by

months, and where no figures appear opposite any month in any column which is headed by the name of one of the four
103 above mentioned shippers absence of such figures indicates that in that particular month the shipper in question made no shipments to the destination shown on the sheet.

On each sheet of the tabulation or statement is shown the tariff rates in force at the time and which were applicable to the shipments made by the several shippers whose shipments are noted on the sheet.

As shown on the several sheets, the tariff rates to a particular destination applicable to each shipper, in many instances vary during the period of the action, and it also appears that in many instances, where two or more shippers during any one month made shipments to any particular destination, that the rates applicable to one such shipper, varied as to the rate or rates applicable to such other shipper or shippers; and in other instances shipments were made by particular shippers to particular destinations in certain months during which no other shipper made such shipments, in which event the tariff rates that would have been applicable to such other shipments if made, are not given on said tabulation.

The shipments of the plaintiff embraced in the tabualtion or statement aggregate 44,579 tons. Of these shipments 40,898 tons were made at the times when the other shippers made shipments at the tariff rates applicable to plaintiff's shipments.

The balance of plaintiff's shipments, to wit: 3,681 tons were made at times or in periods at or during which other shippers either did not make any shipments to a particular point, or else made shipments at tariff rates different than the tariff rates applicable to plaintiff's said shipments.

4. That the tabulation or statement marked "Exhibit D," comprising eleven sheets, embraces all shipments of coke made by the plaintiff herein from its Gallitzin Colliery between October 1, 1899, and May 1, 1901, to destinations or points within the State
104 of Pennsylvania to which a shipment or shipments were made at any time during the period of the action, by either the Altoona Coal and Coke Company, the Glen White Coal and Lumber Company, or by the Columbia Coal Mining Company from the mines of either of the two companies named, and also all shipments made by the three last mentioned companies to such destinations or points.

In all cases, the date and volume of shipments are shown by months, and where no figures appear opposite any month in any column which is headed by the name of one of the three above mentioned shippers, absence of such figures indicates that in that particular month the shipper in question made no shipments to the destination shown on the sheet.

On each sheet of the tabulation of statement is shown the tariff rates in force at the time and which were applicable to the shipments made by the several shippers whose shipments are noted on the sheet.

As shown on the several sheets, the tariff rates to a particular

destination applicable to each shipper, in many instances vary during the period of the action, and it also appears that in many instances, where two or more shippers during any one month made shipments to any particular destination, that the rates applicable to one such shipper, varied as to the rate or rates applicable to such other shipper or shippers; and in other instances shipments were made by particular shippers to particular destinations in certain months during which no other shipper made such shipments, in which event the tariff rates that would have been applicable to such other shipments if made, are not given on said tabulation. The shipments of the plaintiff embraced in the tabulation or statement, aggregate 33,000 tons. Of these shipments 11,655 tons were made at the times when the other shippers made shipments at the tariff rates applicable to plaintiff's shipments.

105 The balance of plaintiff's shipments, to wit: 21,345 tons were made at times or in periods at or during which other shippers either did not make any shipments to a particular point, or else made shipments at tariff rates different than the tariff rates applicable to plaintiff's said shipments.

In making the stipulation the counsel for the plaintiff especially noted, "The plaintiff in signing this stipulation, admits the correctness of the facts of shipments contained therein when taken in connection with the tables, but does not admit that comparison by months is the proper classification in connection with the question of contemporaneous shipment. The plaintiff maintains the integrity of the Referee's ruling that contemporaneous means—during the period while the rebates or lateral allowances were paid."

And the counsel for the defendant especially noted: "This stipulation is not to be treated as a waiver by the defendant of the position or claim heretofore taken and advanced by it that the only shipments of the plaintiff which are comparable with those made by the Altoona Coal & Coke Company, the Glen White Coal & Lumber Company and the Millwood Coal & Coke Company are those made from its Gallitzin mine between October 1st, 1899, and May 1st, 1901, and that all other shipments of the plaintiff are comparable only with the shipments made by the Latrobe Coal Company and the Bolivar Coal & Coke Company; or as a waiver of any other position or claim heretofore advanced by the defendant."

The Referee finds that there is not anything in the said stipulation nor the tabulated statement filed with him on May 29, 1911, to change his conclusions of law, as stated in his report.

* * * * * * *

(Here follow tabulated statements, marked pages 106 and 107.)

COAL
INTRASTATE

Tabulation 354 a

DESTINATION	Mitchell Company Shipments, Excepting those from Gallitzin Colliery between October 1, 1899, and May 1, 1901		Shipments from Latrobe Coal Company's Mines			
			By Latrobe Co.	By Columbia Coal Mining Co.		
Greenwich (Phila.)						
YEAR AND MONTH	Tons	Tariff Rate	Tons	Tons	Tons	Tariff Rate
April 1897	670	inside 1.20 outside .88				
May	231	inside 1.20 outside .88				
June						
July	135	inside 1.20 outside .88				
August						
September						
October						
November	911	inside 1.20 outside .88				
December	80	inside 1.20 outside .88				
January 1898						

January 1898								
February								
March								
April								
May								
June	863		inside .90 outside .75					
July								
August	482		inside .90 outside .75					
September	1,128		inside .90 outside .75					
October	1,213		inside .90 outside .75					
November	296		inside .90 outside .75					
December	203		inside .90 outside .75		131		inside 1.30 outside 1.12	
January 1899					614		inside 1.30 outside 1.12	
February	361		inside .90 outside .75					
Total		6,573				745		
March 1899	188		inside .90 outside .75					
April	652		inside .80 outside .65		275		inside 1.05 outside .90	
May	325		inside .80 outside .65					
June	587		inside .80 outside .65					
July	930		inside .80 outside .65					
August	616		inside .80 outside .65		537		inside 1.05 outside .90	
September	268		inside .80 outside .65					
October								
November								
December	355		inside .80 outside .65					
January 1900	26		inside .80 outside .65					
February	218		inside .80 outside .65					
March								
April	2,185		inside 1.15 outside 1.10					
May	743		inside 1.15 outside 1.00	1,574.	1,692		inside 1.40 outside 1.25	
June	4,419		inside 1.15 outside 1.00		1,514		inside 1.40 outside 1.25	
July	4,387		inside 1.15 outside 1.00					
August	1,539		inside 1.15 outside 1.00		554		inside 1.40 outside 1.25	
September	1,461		inside 1.15 outside 1.00		543			
October	5,773		inside 1.15 outside 1.00					
November	1,881		inside 1.15 outside 1.00					
December	2,467		inside 1.15 outside 1.00					
January 1901	2,479		inside 1.15 outside 1.00		1,029		inside 1.40 outside 1.25	
February	792		inside 1.15 outside 1.00					
March	5,997		inside 1.15 outside 1.00		483		inside 1.40 outside 1.25	
April	3,648		inside 1.15 outside 1.00					
Total		41,336		1,574		6,627		
Grand Total		48,509		1,574		7,372		

COAL
INTRASTATE

Tabulation 353 a

DESTINATION	Mitchell Company Shipments from Gallitzin Colliery between October 1, 1899, and May 1, 1901		Shipments from Altoona Coal and Coke Company's Mines		Shipments from Glen White Coal and Lumber Co.'s Mines		Shipments from Millwood Coal and Coke Company's Mines	
GREENWICH			By Altoona Company	By Columbia Coal Min.Co				
YEAR AND MONTH	TONS	TARIFF RATE	TONS	TONS	TONS	TARIFF RATE	TONS	Tariff Rate
October 1899			31			.80 inside .65 outside		
November								
December								
January 1900								
February	389	.80 inside .65 outside						
March								
April	1,081	1.15 inside 1.00 outside		1,728		1.15 inside 1.00 outside		
May	662	1.15 inside 1.00 outside		1,645		1.15 inside 1.00 outside		
June	3,297	1.15 inside 1.00 outside		2,651		1.15 inside 1.00 outside		
July	5,589	1.15 inside 1.00 outside		1,630		1.15 inside 1.00 outside		
August	3.510	1.15 inside 1.00 outside		2,384		1.15 inside 1.00 outside		
September	5,814	1.15 inside 1.00 outside		1,800		1.15 inside 1.00 outside		
October	5,980	1.15 inside 1.00 outside						
November	1,254	1.15 inside 1.00 outside		406		1.15 inside 1.00 outside		
December	5.154	1.00 outside 1.15 inside						
January 1901	5,241	1.15 inside 1.00 outside						
February								
March				407		1.15 inside 1.00 outside		
April								
TOTALS,	37,971		31	12,651				

108 C. P. No. 3, Philadelphia County, March Term, 1905.

No. 543.

MITCHELL COAL & COKE COMPANY
vs.
PENNSYLVANIA RAILROAD COMPANY.

X. *Report on Recommittal.*

To the Honorable the Judges of the said Court:

The Referee to whom, by the agreement of the parties, the above case was referred, reports, pursuant to the order of Court filed November 4, 1912, as follows:

Judgment should be entered for the plaintiff in the sum of $30,698.95, which amount is made up as follows:

10 cents a ton on 35,087 tons of coal shipped by the plaintiff from its mines, other than its Gallitzin mine after December 3, 1900	$3,508.70
18 cents a ton on 60,093 tons of coal shipped by the plaintiff from its Gallitzin mine between October 1, 1899, and May 1, 1901	10,816.74
20 cents a ton on 32,791 tons of coke shipped by the plaintiff from its Gallitzin mine between October 1 1899, and May 1, 1901	6,558.20
	$20,883.64
Damages for delaying payment, calculated at the rate of 6 per cent. per annum from March 1, 1905, the date when the writ in the case issued	9,815.31
	$30,698.95

A stipulation signed by the counsel for the plaintiff and defendant, filed with the Referee on December 23, 1912, is hereto attached.

All of which is respectfully submitted.

THEODORE F. JENKINS, *Referee.*

109 It is hereby stipulated by counsel for the respective parties as follows:

1. The plaintiff shipped from and after December 3, 1900, from all of its mines, except its Gallitzin mine, to points within the State of Pennsylvania, 35,087 tons of coal, and paid the freights thereon.

NOTE.—The above stipulation is not to be treated as an admission by defendant that under the Court's opinion the plaintiff is entitled to recover as to the above shipments. On the contrary, the defendant contends, and will contend, that no such recovery should be had

because (*a*) It is established by the testimony and stipulations in the case that the rates of freight paid by the plaintiff on the above shipments were less than those paid by the Latrobe Coal & Coke Company, even though the ten cent payment to that Company be taken into account and considered in determining the rate of freight paid. (*b*) Of the said above 35,087 tons, only 471 tons were shipped and transported to destinations to which the defendant also transported shipments of the Latrobe Coal & Coke Company, and consequently the plaintiff's cause of action, if any it has, is limited to these 471 tons. (*c*) The shipments of 35,087 tons include 13,917 tons shipped to Greenwich, and it appears from the testimony in the case that the shipments to Greenwich included coal destined to points beyond the State of Pennsylvania, in respect to which the plaintiff is not entitled to recover in this action.

2. Between October 1, 1899, and May 1, 1901, the plaintiff shipped from its Gallitzin mine to points within the State of Pennsylvania, 60,093 tons of coal, and paid the freights thereon.

NOTE.—The above stipulation is not to be treated as admission by defendant that under the Court's opinion the plaintiff is entitled to recover as to the above shipments. On the contrary, the defendant contends, and will contend, that no such recovery should be had, because (*a*) Of the above tonnage of 60,093 tons, 15,514 were shipped to destinations to which no shipments were transported by the defendant for either the Altoona Coal & Coke Company, the Glen White Coal & Lumber Company or the Millwood Coal & Coke Company. Of the remaining 44,579 tons which were transported to destinations to which the defendant transported shipments for one or more of the three companies named, 37,582 tons, while transported to a destination, viz., Greenwich, to which shipments were transported for one or more of the other three companies, were so transported during a period when a tariff rate was in force under which no shipments were transported by the defendant for either of the said three companies. (*b*) Included in the above 60,093 tons of coal, and also in the 44,579 tons, are 37,971 tons shipped to Greenwich, and it appears from the testimony in the case that the shipments to Greenwich included coal destined to points beyond the State of Pennsylvania, in respect to which the plaintiff is not entitled to recover in this action.

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3. Between October 1, 1899, and May 1, 1901, the plaintiff shipped from its Gallitzin mine to points within the State of Pennsylvania, 32,791 tons of coke, and paid the freights thereon.

NOTE.—The above stipulation is not to be treated as an admission by defendant that under the Court's opinion the plaintiff is entitled to recover as to the above shipments. On the contrary, the defendant contends, and will contend, that no such recovery should be had, because—Of the above 32,791 tons, but 482 were transported by the defendant to destinations to which it transported shipments for either the Altoona Coal & Coke Company, the Glen White Coal & Lumber Company or the Millwood Coal & Coke Company.

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NOTE.—The notes following each of the above numbered paragraphs or stipulations are not part of plaintiff's agreements and plaintiff denies the facts and contests the arguments and conclusions stated in said notes.

GEO. S. GRAHAM.
F. I. GOWEN.

112 C. P. No. 3, Philadelphia County, March Term, 1905.

No. 543.

MITCHELL COAL & COKE COMPANY
vs.
PENNSYLVANIA RAILROAD COMPANY.

XI. *Exceptions of Defendant to Report of Referee, Made Pursuant to Order of Court Filed November* 4, 1912.

The Pennsylvania Railroad Company, the defendant in the above entitled action, excepts to the said report of the Referee in the following particulars:

Assignment of Error No. 10.

[1. The Referee has erred in finding that the plaintiff is entitled to recover $3,508.70, being ten cents a ton on 35,087 tons of coal shipped by it from its mines other than its Gallitzin mine after December 3, 1900.]

Assignment of Error No. 11.

[2. The Referee has erred in finding that the plaintiff is entitled to recover $10,816.74, being eighteen cents a ton on 60,093 tons of coal shipped by it from its Gallitzin mine between October 1, 1899, and May 1, 1901.]

Assignment of Error No. 12.

[3. The Referee has erred in finding that the plaintiff is entitled to recover $6,558.20, being twenty cents a ton on 32,791 tons of coke shipped by it from its Gallitzin mine between October 1, 1899, and May 1, 1901.]

113 4. The Referee has erred in finding that the plaintiff is entitled to recover $9,815.31 as damages for the defendant's delay in making payment of the above mentioned amounts.

5. The Referee has erred in not finding and reporting that the plaintiff is not entitled to recover as to any of the coal shipped from its mines other than its Gallitzin mine after December 3, 1900, because of the fact that even upon the assumption that the rates paid by the Latrobe Coal & Coke Company should be regarded as reduced to the extent of the payment of ten cents per ton made to that company, the reduced rates paid by that company were in excess of the rates paid by the plaintiff on its shipments.

Assignment of Error No. 13.

[6. The Referee has erred in not finding and reporting that of the 35,087 tons of coal shipped by the plaintiff from its mines other than its Gallitzin mine after December 3, 1900, 34,616 tons were transported to destinations to which the defendant transported no shipments for the Latrobe Coal & Coke Company, and that as a consequence the plaintiff had no cause of action as to such shipments.]

Assignment of Error No. 14.

[7. The Referee has erred in not finding and reporting that of the 35,087 tons of coal shipped by the plaintiff from its mines other than its Gallitzin mine after December 3, 1900, 13,917 tons had been shipped to Greenwich, and as it appears from the testimony that the plaintiff's shipments to Greenwich included interstate and intrastate shipments, and the plaintiff failed to show the division as between the same, no recovery could be had as to any of the Greenwich shipments.]

Assignment of Error No. 15.

[8. The Referee has erred in not finding and reporting that of the 60,093 tons of coal shipped by the plaintiff from its
114 Gallitzin mine between October 1, 1899, and May 1, 1901, 15,514 tons were shipped to points or destinations to which neither the Altoona Coal & Coke Company, the Glen White Coal & Lumber Company nor the Millwood Coal & Coke Company made any shipments, and that consequently as to these 15,514 tons the plaintiff was not entitled to recover.]

Assignment of Error No. 16.

[9. The Referee has erred in not finding and reporting that of the 44,579 tons of coal shipped by the plaintiff from its Gallitzin mine between October 1, 1899, and May 1, 1901, to points or destinations to which the defendant transported shipments for either the Altoona Coal & Coke Company, the Glen White Coal & Lumber Company or the Millwood Coal & Coke Company, 37,971 tons were shipped to Greenwich, and as it appears from the testimony that the plaintiff's shipments to Greenwich included interstate and intrastate shipments, and the plaintiff failed to show the division as between the same, no recovery could be had as to any of the Greenwich shipments.]

10. The Referee has erred in not finding and reporting that of the aforesaid 44,579 tons, 37,582 tons were transported to a destination, viz., Greenwich, during a period while rates of freight were in force under which no shipments were transported by the defendant for either the Altoona Coal & Coke Company, the Glen White Coal & Lumber Company or the Millwood Coal & Coke Company.

Assignment of Error No. 17.

[11. The Referee has erred in not finding and reporting that of the 32,791 tons of coke shipped by the plaintiff from its Gallitzin mine between October 1, 1899, and May 1, 1901, 32,309 tons were transported by the defendant to destinations to which it transported no shipments for either the Altoona Coal & Coke Company, the Glen White Coal & Lumber Company or the Millwood Coal & Coke Company, and that as a consequence the plaintiff has no cause of
115 action as to such shipments.]

12. The Referee has erred in reporting that judgment should be entered for the plaintiff in the sum of $30,698.95.

FRANCIS I. GOWEN,
JOHN G. JOHNSON,
For Defendant.

116 C. P. No. 3, Philadelphia County, March Term, 1905.

No. 543.

MITCHELL COAL & COKE COMPANY
vs.
PENNSYLVANIA RAILROAD COMPANY.

XII. Report on the Exceptions Filed to the Report of the Referee Pursuant to the Order of Court Made on November 4th, 1912.

To the Honorable the Judges of the Said Court:

The Referee respectfully reports:

The Referee having prepared his report made pursuant to the order of your Honorable Court filed November 4, 1912, notified the counsel for the parties, plaintiff and defendant, on January 6, 1913, that the report would be filed on January 16, 1913, until which time exceptions could be filed thereto. On January 14, 1913, exceptions were filed by the counsel for the defendant; none has been filed by the counsel for the plaintiff.

No requests for findings of fact or law were filed by the counsel for either of the parties.

The exceptions filed by the defendant's counsel are hereto annexed.

The Referee has considered the exceptions and reports that all of them should be dismissed.

The seventh and ninth exceptions raise the question
117 whether the plaintiff can recover in this action as to shipments made to Greenwich, Pennsylvania, from which point there might have been a reshipment to places outside of Pennsylvania.

The shipments to Greenwich were consigned to the plaintiff so that the contract for carriage ceased when the coal was delivered there. The plaintiff might have sold the coal at that place. To have moved the coal from Greenwich a new contract for carriage would have been necessary.

The defendant's counsel referred the Referee to the case of Railroad Commission of Ohio vs. Worthington, 225 U. S. 101, as deciding the question in favor of the defendant.

The shipments involved in that case were from mines in Ohio, and the contract of carrying required that the coal should be placed by the carrier on vessels navigating the Great Lakes. It was accepted as a fact in the case that practically all of the coal so shipped was carried in vessels to ports outside of the State of Ohio. The Railroad Commission of Ohio made an order regulating the rate for the carrying of such coal. The Supreme Court of the United States held that the shipments were not intrastate, and therefore the order of the Railroad Commission was an attempt to regulate interstate commerce and beyond the power of the State or a commission assuming to act under its authority.

If the circumstances in the present case had been like those in the case above cited, the Referee would have held that the plaintiff could not recover in this action as to coal destined to ports outside of Pennsylvania, because the plaintiff's rights, if any, would have to be enforced in the mode provided by the Interstate Commerce Law, and therefore not within the jurisdiction of the courts of Pennsylvania.

The distinction between the present case and that of Railroad Commission vs. Worthington, 225 U. S. 101, the Referee
118 considers is clearly pointed out in the opinion of the Supreme Court of the United States. Mr. Justice Day, speaking for the Court, said (pages 108, 109):

"Does the transportation which the rate prescribed by the Railroad Commission of Ohio covers constitute interstate commerce? It is true that the shipper transports the coal ordinarily upon bills of lading to himself, or to another for himself at Huron, on Lake Erie. The so-called 'lake cargo coal' is necessarily shipped beyond Huron. If it stops there, another and higher rate applies. Practically all of it is put on vessels for carriage beyond the State, usually to upper lake ports, and then and only then the seventy cent rate fixed by the Commission applies. This seventy cent rate covers the transportation of the coal to Huron, the placing of it on board vessels, and if necessary, trimming it for the continuance of its interstate journey. It is true, as argued by the learned counsel for the Commission, that this coal may be accumulated in large quantities at Huron, and only taken out of the accumulated lots from time to time, when it is to be put upon vessels and shipped out of the State, but it must always be remembered that this seventy cent rate applies solely to such coal as is in fact placed upon vesseds for carriage to beyond the State points and, as the Circuit Court said, the substance of things is not changed by the fact that a small part may be unloaded at one of the Ohio islands in Lake Erie. The situation then comes to this, that the rate put in force is applicable only to coal which is to be carried from the mine in Ohio to the lake, there placed upon vessels and thence carried to upper lake ports beyond the State. By every fair test the transportation of this coal from the mine to the upper lake ports is an interstate carriage, intended by the parties to

be such, and the rate fixed by the Commission which is in controversy here is applicable alone to coal which is thus, from the beginning to the end of its transportation, in interstate carriage, and such
119 rate is intended to and does cover an integral part of that carriage, the transportation from the mine to the Lake Erie port, the placing upon the vessel and the trimming or distributing in the hold, if required, so that the vessel may complete such interstate carriage. Much stress is laid in argument for the Commission upon the fact that the coal is billed only to Huron, and it is said that in that aspect of the case it is controlled by Gulf, Colorado & Santa Fe Railway Company vs. Texas, 204 U. S. 403. There it was sought to hold a railroad company upon a shipment of corn from Texarkana to Goldthwaite, Texas, for a violation of the regulations of the State Railroad Commission applicable to intrastate carriers. The company contended that the shipment was in fact an interstate carriage from Hudson, South Dakota, to Goldthwaite, Texas. The facts showed that the corn was carried upon a bill of lading from Hudson to Texarkana, and that afterwards some five days later, it was shipped from Texarkana to Goldthwaite, both points in the State of Texas. This was held to be an intrastate shipment unaffected by the fact that the shipper intended to reship the corn from Texarkana to Goldthwaite, for, as this Court held, the corn had been carried to Texarkana upon a contract for interstate shipment, and the reshipment five days later upon a new contract was an independent intrastate shipment. It is evident from this statement of facts that the case is quite different from the one under consideration. There a new and independent contract for intrastate shipment was made, the interstate transportation having been completely performed; here a rate is fixed on that part of an interstate carriage which includes the actual placing of the coal into vessels, ready to be carried beyond the State destination."

By reason of a remark in the opinion of your Honorable Court, filed on November 4, 1912, the Referee reports that his original report was prepared and notice given to the counsel for the re-
120 spective parties February 25, 1910, that the report would be filed on March 10, 1910; a copy of the report accompanied the said notice.

Exceptions were filed on behalf of the plaintiff, arguments were held before the Referee, and his report was held by him awaiting the convenience of counsel, who upon May 29, 1911, filed with the Referee certain tabulated statements and a stipulation. The Referee's report was filed on July 12, 1911. The Referee was informed that an application had been made to your Honorable Court for the allowance of an amendment to the plaintiff's statement of claim, and that the application had been refused. The Referee was not informed of the reasons for the refusal of the application, and did not know that an opinion had been filed by your Honorable Court stating the reasons for the refusal of the application until he received a copy of the opinion of your Honorable Court, filed November 4, 1912.

All of which is respectfully submitted.

THEODORE F. JENKINS, *Referee.*

121 C. P. No. 3, Philadelphia County, March Term, 1905.

No. 543.

MITCHELL COAL & COKE COMPANY
vs.
PENNSYLVANIA RAILROAD COMPANY.

XIII. *Opinion.*

FERGUSON, *J.*, March 1, 1913:

An order has been filed this day sustaining the fourth exception to the supplemental report of the Referee and dismissing all other exceptions.

The question involved in the fourth exception is the one of damages awarded for delay in payment. In our opinion such damages cannot be allowed. In this view we think we are sustained by the case of Pierce vs. Lehigh Valley Coal Co., 232 Pa. 170. In the case at bar the amount claimed was $93,000 and the actual damages found to be $20,883.64. The result shows that the officers of the defendant company were justified in resisting the claim. They, therefore, cannot be held at fault in respect to the delay. An additional justification in resisting payment of the amount claimed is found in the fact that the defendant company was by law prohibited from making payment to a shipper of an amount to which it was not legally entitled.

122 C. P. No. 3, Philadelphia County, March Term, 1905.

No. 543.

MITCHELL COAL & COKE COMPANY
vs.
PENNSYLVANIA RAILROAD COMPANY.

Decree.

And now, to wit, this first day of March, A. D. 1913, upon consideration of the Referee's supplemental report, it is ordered as follows:

The first exception is dismissed.
The second exception is dismissed.
The third exception is dismissed.
The fourth exception is sustained.
The fifth exception was withdrawn by defendant.
The sixth exception is dismissed.
The seventh exception is dismissed.
The eighth exception is dismissed.
The ninth exception is dismisssed.
The tenth exception is dismissed.
The eleventh exception is dismissed.
The twelfth exception is sustained to the extent of the reduction in the amount of the damages awarded by reason of the disallowance of damages for delay in payment.

Decree.

Assignment of Error No. 18.

[And now, to wit, March 6th, 1913, it is hereby ordered as of March 4th, 1913, that judgment therein be entered in favor of the plaintiff against the defendant, for the sum of $20,883.64.]
By the Court.

W. C. F., *J.*

123 C. P. No. 3, Philadelphia County, March Term, 1905.

No. 543.

MITCHELL COAL & COKE COMPANY
vs.
PENNSYLVANIA RAILROAD COMPANY.

Assignments of Error.

* * * * * * *

10. The Court below erred in overruling the following exception of the defendant to the Referee's supplemental report:
"1. The Referee has erred in finding that the plaintiff is entitled to recover $3,508.70, being ten cents a ton on 35,087 tons of coal shipped by it from its mines other than its Gallitzin mine after December 3, 1900." (Page 140.)
11. The Court below erred in overruling the following exception of the defendant to the Referee's supplemental report:
"2. The Referee has erred in finding that the plaintiff is entitled to recover $10,816.74, being 18 cents a ton on 60,093 tons of coal shipped by it from its Gallitzin mine between October 1, 1899, and May 1, 1901." (Page 140.)

* * * * * * *

14. The Court below erred in overruling the following exception of the defendant to the Referee's supplemental report:
"7. The Referee has erred in not finding and reporting that of the 35,087 tons of coal shipped by the plaintiff from its mines other than its Gallitzin mine after December 3, 1900, 13,917 tons had been shipped to Greenwich, and as it appears from the testimony that the plaintiff's shipments to Greenwich included interstate and intrastate shipments, and the plaintiff failed to show the division as between the same, no recovery could be had as to any of the Greenwich shipments. (Page 141.)

* * * * * * *

124 16. The Court below erred in operruling the following exception of the defendant to the Referee's supplemental report:

"9. The Referee has erred in not finding and reporting that of the 44,579 tons of coal shipped by the plaintiff from its Gallitzin mine between October 1, 1899, and May 1, 1901, to points or destinations to which the defendant transported shipments for either the Altoona Coal & Coke Company, the Glen White Coal & Lumber Company or the Millwood Coal & Coke Company, 37,971 tons were shipped to Greenwich, and as it appears from the testimony that the plaintiff's shipments to Greenwich included interstate and intrastate shipments, and the plaintiff failed to show the division as between the same, no recovery could be had as to any of the Greenwich shipments." (Page 142.)

* * * * * * * *

18. The Court below erred in entering judgment for the plaintiff in the amount of $20,883.64. (Page 152.)

125 In the Supreme Court of Pennsylvania, Eastern District, January Term, 1913.

Nos. 91 and 104.

MITCHELL COAL AND COKE COMPANY
vs.
THE PENNSYLVANIA RAILROAD COMPANY.

Appeals by the Plaintiff and the Defendant from the Judgment of the Court of Common Pleas No. 3 of Philadelphia County.

Filed June 27, 1913.

MESTREZAT, *J.*:

These two appeals are from the same judgment, were argued together, and may be considered and disposed of in one opinion. While the record is voluminous, as suggested by the learned judge of the common pleas, and numerous assignments of error have been filed by both parties, we will consider, as the parties in their printed briefs have done, the questions presented without specific reference to the several assignments.

The action was trespass to recover damages for unlawful discrimination in freight rates which the plaintiff company, as a shipper of coal and coke, alleges it sustained by reason of the defendant carrier allowing secret rebates or drawbacks on intrastate shipments to other shippers of coal and coke for whom it rendered substantially the same service as was rendered to the plaintiff during the period of action, namely, from April 1, 1897, to May 1, 1901. The suit was brought March 1, 1905. The pleas were not guilty and the statute of limitations. By agreement of the parties, the case was referred to a referee clothed with the powers of a master in chancery, and after an exhaustive consideration of both facts and law he reported in favor of the plaintiff. Certain exceptions to his report were sustained, but a judgment was entered against the defendant company for the amount of the damages which it was found the

plaintiff sustained by reason of the rebates or drawbacks
126 given the favored shippers. Both parties have appealed.

The referee found on ample testimony that the moneys paid by the defendant company to the favored shippers were unlawful rebates or drawbacks, and not, as claimed by it, compensation for use of their short line railroads or for services rendered by the shippers. This was a question of fact, and while the testimony was conflicting and a different finding might have been justified, the evidence was sufficient to warrant the referee's conclusion and, therefore, we would be infringing a settled rule if we reversed the finding of the referee confirmed by the judgment of the court.

The plaintiff's application to amend its statement was properly denied. The application was made about nine years after the close of the period of action, and more than five years after the suit was brought. The statement averred two specific charges of discrimination: (*a*) for the coal and coke shipped from Gallitzin between October 1899 and May 1901, the defendant company charged and collected from the plaintiff fifteen cents per ton more than it charged and collected from the Altoona, the Glen White, and the Millwood Companies; and (*b*) for the coal and coke shipped from five other collieries of the plaintiff and also from its Gallitzin mine before October 1899, the defendant company charged and collected ten cents per ton more than it charged and collected from the Latrobe and Bolivar Companies. In other words, the plaintiff's cause of complaint, as set out in its statement, is founded on the money paid to the Latrobe and Bolivar Companies, except the money paid for the shipments from its Gallitzin mine after October 1, 1899. It was proposed to amend the statement by alleging with respect to the plaintiffs' six collieries (excepting Gallitzin after October 1899) discriminating acts on the part of the defendant and in favor of the Altoona, the Glen White, and Millwood Companies so that the plaintiff's whole claim, excepting Gallitzin after 1899, would be based on rebates paid the three favored companies during the period of action. The plaintiff also asked leave to amend the statement by alleging treble damages under the act of June 4, 1883, P. L.
127 Both amendments were refused because they averred a new cause of action which was barred by the statute of limitations. The services rendered by the defendant for plaintiff's six collieries (except the Gallitzin before October 1899) and for the two favored companies, Latrobe and Bolivar, were similar and the effect of the rebate was to cause damage to the plaintiff to the extent of the rebate. The services of the defendant company to the Gallitzin colliery after October 1899 were similar to those rendered the three favored companies, Altoona, the Glen White, and the Millwood, and the plaintiff was injured to the extent of the rebates allowed these companies. Each of these four collieries had a short line railroad and a locomotive which conveyed its product from the mine to the defendant company's railroad. The plaintiff's six collieries (except the Gallitzin after October 1899) had no means of conveying the product from the mine to the defendant's road. The unlawful discrimination for which the plaintiff can recover is between its mines receiving

from the defendant services similar to those rendered the favored companies. Here, as is apparent, if the averments of the original statement be true, the services rendered by defendant to Latrobe and Bolivar Companies and the plaintiff's six companies were not similar to those rendered the other three favored companies and the Gallitzin mine of the plaintiff for a short period. The proposed amendment to the statement, therefore, alleges different acts of discrimination by the defendant company, causing the injury and hence introduces a new cause of action.

The practice act provides that the declaration in an action of trespass shall consist of a concise statement of the plaintiff's demand as provided in the act of 1806 which requires that "the whole amount that he, she or they believe is justly due to him, her or them from the defendant" be specified. It will be observed that the statement in the present case declares for single damages in the sum named and that it contains no averment that the suit was brought under the act of 1883 to recover treble damages. The statement avers
the duty of the defendant as a common carrier to treat every
128 shipper alike in fixing freight rates for the transportation of
coal and coke under substantially similar circumstances and conditions, the failure to perform such duty during the period of action, sets out the discriminatory acts done by the defendant which the plaintiff company alleges constituted an unlawful and unreasonable discrimination against it as a shipper of coal and coke over the lines of the defendant's railroad, and avers that by reason of the premises the plaintiff had been damaged in the aggregate sum of $93,905 payment of which was demanded and refused. An action of trespass at common law is brought to recover compensation for the injuries sustained and a statutory action is for the penalty imposed for the infringement of the statute. Where, therefore, suit is brought on a statute to recover double or treble damages we have regarded it as an action for a statutory penalty and required the cause of action as such to be averred in the statement: Hughes vs. Stevens, 36 Pa. 320; Dunbar Furnace Company vs. Fairchild, 121 Pa. 563; Fairchild vs. Dunbar Furnace Company, 128 Pa. 485; Allen vs. Tuscarora Valley Railroad Company, 229 Pa. 97. Had the proposed amendment been allowed the cause of action would have been changed from a suit for single damages for unlawful discrimination to a suit for a penalty imposed by the act of 1883 for the unlawful conduct of the defendant company. The learned court was right in refusing the amendment.

We think the court below did not err in limiting the plaintiff's right to recover to six years prior to the date the action was brought. The most that can be said for the testimony introduced by the plaintiff to toll the statute is that Mr. Joyce, the defendant's coal freight agent, promised Mr. Mitchell that the plaintiff company should in the future receive as good treatment and rates as other shippers and should be notified if there were any additional concessions of any kind made to any shipper. These promises, it appears, were not kept, and preferential rates were given to some of plaintiffs' competitors. This was discreditable conduct on the part of the defendant

company, and a plain violation of its duty as a common
129 carrier. But it was simply a failure to observe a promise, and not fraudulent conduct, which prevents the running of the statute. As said by the learned trial judge: "No greater duty was imposed by the promise than the law imposed, but the breach was not a fraud or deceit or concealment in the sense contemplated by law, when it is sought to escape the operation of the statute of limitations."

The shipments to Greenwich, Philadelphia, were intrastate, and hence were properly included in this action. They were consigned to plaintiff at Greenwich and there the contract of carriage between the plaintiff and the defendant was fully performed and ended. What disposition the plaintiff made of the shipments at Greenwich, whether it sold them or sent them within or beyond the state is immaterial as affecting the question whether as between the plaintiff and the defendant they were intrastate or interstate.

The learned court was right in declining to hold, as requested by defendant, that the plaintiff had no cause of action in respect to shipments made after the fall of 1898 because the payments of freight on the shipments were made voluntarily by the plaintiff unaccompanied by any protest against the right of the defendant to charge and collect the same, with knowledge of the payments made to the Altoona and Glen White Companies. The plaintiff admits its President at one time heard that the Altoona and Glen White Companies were receiving from defendant compensation for the use of their locomotives in conveying coal from their mines to the defendant's road, but denies it knew that the defendant was paying those companies illegal rebates or drawbacks on the coal shipped by them. It is difficult to understand how the defendant can now allege that the plaintiff company had knowledge that unlawful rebates were being paid to the favored shippers at the time it paid the freight on its shipments. The defendant has consistently denied from
130 the time the payments were made and continues to deny that they were unlawful rebates, and asserts they were made for services rendered in relief of defendant and were therefore lawful. Had the plaintiff company sought information on the subject from the defendant itself, it would have met with a denial that such payments were discriminatory or illegal rebates. It is therefore, not apparent how the defendant can successfully allege that the plaintiff had knowledge of the payment of the rebates and at the same time deny that such payments were made. Be this as it may, it is sufficient to say that this action was not brought to recover back moneys paid by mistake or otherwise to the defendant, but to recover damages for the breach of the defendant's duty as a common carrier in unlawfully discriminating against the plaintiff by payment of rebates to competing shippers. In such case, the doctrine of voluntary payments can have no application: Borda vs. Railroad Company, 141 Pa. 484. In this case, the action was to recover damages for alleged illegal discrimination on coal shipments by payment of rebates, and the counsel for the carrier company set up the defense of voluntary payments, but it was not sustained, the referee whose report was

confirmed by the common pleas and by this court saying (p. 493): "The simple answer (to the contention of the carrier), however, is that this is not an action to recover back freights paid, but an action of tort, to recover damages for a breach of the defendant's duty to the plaintiffs."

The learned referee has found after a careful and exhaustive consideration of all the testimony that the service rendered by the defendant to the favored shippers in the transportation of coal and coke for them upon which drawbacks or rebates were paid was a like service, from the same place, upon like conditions and under substantially similar circumstances and for the same period of time as the service performed for the plaintiff company in the transportation for that company of coal and coke upon which no drawback or rebate was paid. This finding was confirmed by the learned court below. We have examined with care the voluminous testimony and the authorities cited by the learned referee and by counsel of the parties and are satisfied that the court and referee reached a correct conclusion. Without taking up and discussing the testimony
131 which was done in the elaborate report of the learned referee, it is sufficient to say that it was ample to sustain his findings on this branch of the case.

The learned court below points out in its opinion the facts which defeat the plaintiff company's right to compensation for delay in payment of its claim.

We have examined the case with special reference to the several questions raised by all of the assignments filed by both appellants, and have discovered no error which would justify a reversal of the judgment entered by the court below.

The judgment is affirmed.

132 In the Supreme Court of the United States, —— Term, —.

No. —.

PENNSYLVANIA RAILROAD COMPANY, Plaintiff in Error,
vs.
MITCHELL COAL & COKE COMPANY, Defendant in Error.

In Error to the Supreme Court of Pennsylvania.

We hereby acknowledge service upon us of a copy of the attached præcipe filed with the Prothonotary of the Supreme Court of Pennsylvania upon behalf of the Plaintiff in Error in the above entitled proceeding, indicating the portions of the Record to be incorporated into the Transcript of the Record on Writ of Error.

We also acknowledge service upon us of a copy of the Specifications of Error filed in said case.

GEO. S. GRAHAM.
JOSEPH GILFILLAN.

Sept. 24, 1913.

133 In the Supreme Court of Pennsylvania, Eastern District, January Term, 1913.

No. 104.

MITCHELL COAL & COKE COMPANY
vs.
THE PENNSYLVANIA RAILROAD COMPANY, Appellant.

Præcipe Indicating the Portions of the Record to be Incorporated Into the Transcript of the Record on Writ of Error.

To the Honorable James T. Mitchell, Prothonotary of the Supreme Court of Pennsylvania:

Pursuant to Section 1 of Rule 8 of the Rules of Practice of the Supreme Court of the United States, you are respectfully requested to incorporate into the Transcript of the Record to be certified to the Supreme Court of the United States, and there filed in connection with the Writ of Error heretofore sued out from the Supreme Court of Pennsylvania to the said Supreme Court of the United States in the above entitled case, the following portions of the Record.

134 1. Original statement of Plaintiff's claim (printed on page 1*a* et seq. of the appendix to appellant's paper book filed in this case in the Supreme Court of Pennsylvania, a copy of which is hereto attached and marked Exhibit "A").

2. Defendant's pleas (printed on page 12*a* of Exhibit "A" hereto attached).

3. Agreement of reference (to be found in the original records certified to the Supreme Court of Pennsylvania by the Court of Common Pleas No. 3 of Philadelphia County).

4. The following excerpts from the testimony:

Testimony of Mr. Searles (printed on page- 124*a*, 125*a*, and 126*a* of Exhibit "A" hereto attached, beginnig on page 124*a* with the question, "Q. What did you mean to convey when you made the apparent differentiation of coal to be re-shipped outside the capes?" and ending on page 126*a* with the answer, "A. So far as this was concerned so far as the rates that were charged. All of this testimony on this point has been in regard to coal. I am not testifying as to coke rates.")

And also the testimony of Mr. Searles (printed in the attached Exhibit "A" on pages 146*a*, 147*a*, 148*a*, and 149a, beginning on page 146*a* with the question, "Q. You furnished these letters in response to my request? (Referring to a letter dated Philadelphia, February 12, 1897, from J. G. Searles to Mr. O. A. Knipe, and also a letter dated April 15, 1898, from said Searles to said Knipe, and also letter of April 6, 1899, from said Searles to said Knipe)" and ending on page 149*a* with the answer, "A. Those were practically the tariff rates.")

5. Excerpt from the report of the Referee on Exceptions (printed on page 120 et seq. of appellant's paper book filed in this case in the Supreme Court of Pennsylvania, a copy of which is hereto attached

and marked Exhibit "B," beginning on page 120 at the beginning of the report and ending on page 126, with and including the paragraph, "The Referee finds that there is not anything in the said stipulation nor the tabulated statement filed with him on May 29, 1911, to change his conclusions of law, as stated in his report.")

6. Tabulations showing the Greenwich shipments, (printed as pages 353*a* and 354*a* of Exhibit "A" hereto attached.

7. Report of Referee on recommittal (printed on pages 137 et seq. of Exhibit "B" hereto attached).

8. Exceptions of defendant to report of Referee made pursuant to the order of court filed November 4th 1912 (printed on page 140 et seq. of Exhibit "B" hereto attached.

9. Report of Referee on exceptions filed to the report of the Referee pursuant to the order of court made November 4, 1912, (printed on page 143 et seq. of Exhibit "B" hereto attached).

135 10. Opinion of the court on exceptions (printed on page 148 of Exhibit "B" hereto attached).

11. The two decrees of the Court of Common Pleas (printed on page 152 of Exhibit "B" hereto attached).

12. Appellant's assignments of error numbers 10, 11, 14, 16 and 18 (printed on pages 157, 158, 159 and 160 of Exhibit "B" hereto attached).

13. Opinion of the Supreme Court of Pennsylvania affirming the judgment of the court below.

14. Petition filed by the plaintiff in error with the Honorable D. Newlin Fell, Chief Justice of the Supreme Court of Pennsylvania, praying for the allowance of a writ of error from the Supreme Court of Pennsylvania to the Supreme Court of the United States.

15. Action of the Honorable D. Newlin Fell, Chief Justice, allowing the writ of error.

16. Writ of error on appeal to the United States Supreme Court.

17. Specifications of error filed by the plaintiff in error.

FRANCIS I. GOWEN,
Attorney for Plaintiff in Error.

136 COMMONWEALTH OF PENNSYLVANIA,
County of Philadelphia, ss:

On this — day of September in the year of our Lord, one thousand nine hundred and thirteen, before me, the undersigned, —— ——, personally appeared —— ——, who being duly sworn according to law doth depose and say that he served a copy of the foregoing Præcipe upon Joseph Gilfillan, of the attorneys of record for the said Mitchell Coal & Coke Company, the defendant in error, plaintiff below, by handing him a true and correct copy of the said Præcipe, and of the Exhibits thereto attached, on the —day of September A. D. 1913.

—— ——.

Sworn to and subscribed before me this — day of September, 1913.

—— ——.

137 In the Supreme Court of Pennsylvania, Sitting in the Eastern District, January Term, 1913.

No. 104.

MITCHELL COAL & COKE CO.
vs.
THE PENNSYLVANIA RAILROAD CO., Appellant.

Appellee's Præcipe for Preparation of Record.

To the Honorable James T. Mitchell, Prothonotary of said Court:

The appellee in the above case, desiring portions of the record included in the transcript to be certified to the Supreme Court of the United States additional to the portions mentioned in the præcipe herein filed by appellant, pursuant to the provisions of Section 1 of Rule 8 of the rules of practice of the Supreme Court of the United States, hereby designates the following additional portions of the record to be included therein:

(1) Defendant's requests for facts, beginning page 28 and ending page 46 of appellant's Exhibit "B."

(2) Defendant's requests for conclusions of law, beginning page 47 and ending page 53 of said Exhibit "B."

(3) The following excerpts from the referee's findings of
138 fact:

Paragraphs 53-54-55-56-57-58-59-60-61-62 & 63, to be found on pages 74 to 77 of said Exhibit "B."

Paragraphs 68-69 & 70, to be found on pages 77 and 78 of said Exhibit "B."

(4) Defendant's exceptions to referee's findings of fact beginning page 102 and ending page 114 of said Exhibit "B."

Defendant's exceptions to referee's findings of law, beginning page 114 and ending page 120 of said Exhibit "B."

(5) The following excerpts of testimony from appellant's Exhibit "A.":—

Testimony of Mr. Searles beginning on page 36*a* with the

"Q. Tell us what was the lateral allowance on both coal and coke for the Altoona Coal and Coke Company during the period of 1897, 1898, '99, 1900 and 1901."

and ending on page 38*a* with the

"A. Yes, sir; during the period specified."

Testimony of Mr. Mitchell, beginning on page 42*a* with the

"Q. Did you have anything to do with the arranging for the rates for the transportation of the coal with the officials of the Pennsylvania Railroad?"

and ending on page 45*a* with the

"A. To the shipper, and the shipper was the party that furnished the rates."

Testimony of Mr. Mitchell, beginning on page 59*a* with the

"Q. Tell us about the installation of the locomotive at Gallitzin. When was it put on?"

and ending on page 61*a* with the

"A. Yes, sir; the same thing."

139 Testimony of Mr. Mitchell, beginning on page 112*a* with the

"Q. When you were negotiating with the Railroad Company with reference to the movement of your coal over the Gallitzin spur yourself, you wanted them to pay you 5 cents a ton for your services, did you not?"

and ending on page 113*a* with the

"A. Yes, sir. Because I understood they did not get it on short points."

Testimony of Mr. Searles, beginning on page 121*a* with the

"Q. You did give the same net rate to Columbia for coal from Latrobe as from Clearfield, shipped to tidewater, to be shipped outside the Capes?

and ending on page 124*a* with the

"A. That I could not answer without going over our books again."

Testimony of Mr. Searles on page 126*a*, as follows:

"Q. When were the rates on coal shipped from the Latrobe region and Clearfield region made the same where the coal was sent to Greenwich for reshipment outside the Capes?

A. For reshipment by water outside the Capes or within the Capes, December 3, 1900."

Testimony of Mr. Searles, beginning on page 164*a* with the

"Q. Did the Millwood Coal & Coke Company receive the lateral allowance heretofore referred to by you on all commercial coal produced and shipped by them, directly or by some consignee who purchased the coal f. o. b. the mines?"

and ending on page 167*a* with the

"A. Practically; yes, sir."

140 Testimony of Mr. Searles on page 168*a* as follows:

"Q. Do you not know that you charged Mitchell a dollar freight in Philadelphia when coal was transported for somebody to the Atlantic Refining Company for 80 cents?

A. I do not know. I could not tell who the coal was shipped to. The statement that we have made up show that we made settlement with Mr. Mitchell on coal to Greenwich piers, Philadelphia, or to somebody else."

Testimony of Mr. Mitchell, beginning on page 275*a* with the

"Q. In the statement of shipments made by your Company to South Amboy and to Greenwich, are included, are there not, a number of shipments which were turned over by you after the arrival of the coal at Greenwich and South Amboy to other companies,

upon terms which obligated them for the price of the coal at the mines, they paying the freight on that coal?"

and ending on page 276*a* with the

"A. Very often we would sell some coal outright that we had there."

Testimony of Mr. Mitchell, beginning on page 302*a* with the

"Q. You have spoken of a bond which you thought the Railroad Company at one time required you to give covering freight, and you said that your recollection was that that was limited to tidewater shipments."

and ending on page 303*a* with the

"A. Yes, sir; when I first commenced to ship to tidewater was when I gave this bond."

GRAHAM & GILFILLAN,
Attorneys for Defendant in Error
in Supreme Court of United States.

[Endorsed:] In the Supreme Court of Pennsylvania Sitting in the Eastern District, January Term, 1913. No. 104. Mitchell Coal and Coke Co., vs. The Pennsylvania Railroad Company, Appellant. Appellee's Præcipe for Preparation of Record. Graham & Gilfillan, Attorneys for Defendant in Error in Supreme Court of United States. Filed Sept. 30, 1913, in Supreme Court.

141 STATE OF PENNSYLVANIA,
Eastern District:

I, Alfred B. Allen, Deputy Prothonotary of the Supreme Court of Pennsylvania, in and for the Eastern District, do hereby certify that the above and foregoing is a true copy of Record in the above entitled cause, so full and entire as is indicated by the attached præcipe.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court at Philadelphia, this 11th day of October, A. D. 1913.

[Seal of the Supreme Court of Pennsylvania, Eastern District, 1776.]

ALFRED B. ALLEN,
Deputy Prothonotary.

142 I, D. Newlin Fell, Chief Justice of the Supreme Court of Pennsylvania, do hereby certify, That Alfred B. Allen, was, at the time of signing the annexed attestation, and now is, Deputy Prothonotary of the said Supreme Court of Pennsylvania, in and for the Eastern District, to whose acts, as such, full faith and credit are and ought to be given; and that the said attestation is in due form.

In witness whereof, I have hereunto subscribed my name this 11th day of October, one thousand nine hundred and thirteen.

D. NEWLIN FELL.

I, Alfred B. Allen, Deputy Prothonotary of the Supreme Court of Pennsylvania, in and for the Eastern District, do certify, That the Honorable D. Newlin Fell, by whom the foregoing Certificate was made and given, was, at the time of making and giving the same, and is now, Chief Justice of the Supreme Court of Pennsylvania; to whose acts, as such, full faith and credit are and ought to be given, as well in Courts of Judicature as elsewhere; and that his signature, thereto subscribed, is genuine.

In testimony whereof, I have hereunto set my hand and affixed the Seal of the said Supreme Court of Pennsylvania, in and for the Eastern District, at Philadelphia, this 11th day of October, one thousand nine hundred and thirteen.

[Seal of the Supreme Court of Pennsylvania, Eastern District, 1776.]

ALFRED B. ALLEN,
Deputy Prothonotary.

Endorsed on cover: File No. 23,922. Pennsylvania Supreme Court. Term No. 287. The Pennsylvania Railroad Company, plaintiff in error, vs. Mitchell Coal & Coke Company. Filed October 30th, 1913. File No. 23,922.

In the Supreme Court of the United States.

OCTOBER TERM, 1914. No. 287.

The Pennsylvania Railroad Company, Plaintiff in Error,

vs.

Mitchell Coal and Coke Company.

IN ERROR TO THE SUPREME COURT OF THE STATE OF PENNSYLVANIA.

BRIEF OF PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

The present action was instituted in a State Court of Pennsylvania by the defendant in error, the Mitchell Coal and Coke Company, a shipper of bituminous coal over the lines of the Pennsylvania Railroad Company, the plaintiff in error, to recover from the latter a portion of the freight rates paid for the transportation of such coal.

The right to recover was rested upon the payment of

what the defendant in error claimed were rebates to other shippers, and the amount claimed and actually recovered was the amount per ton that was paid to these other shippers as rebates, as the defendant in error asserted.

No attempt was made by the defendant in error to establish any resultant injury to it from the payments complained of, and the amount of the award made to it was ascertained and determined upon the theory that it was entitled to the same concessions in rates which had resulted, as claimed, from the payments made to the other shippers.

The rates which the defendant in error had paid were the tariff rates applicable to the shipments made by it.

Included in the shipments in respect to which the defendant in error recovered were shipments which had been transported by the plaintiff in error from the defendant in error's mines which were located in the State of Pennsylvania, to Greenwich, a tidewater shipping point within the limits of Philadelphia. The rail transportation of these shipments had consequently been wholly within the State of Pennsylvania, but the rates of freight charged on these shipments were rates which applied exclusively to coal transported to Greenwich by rail, and thence by water to points beyond the Capes of the Delaware.

The plaintiff in error upon the theory that the rail transportation of this coal was but a part of the entire transportation, which was interstate in character, contended that a State Court was without power to pass upon the questions involved in the action, in so far as these affected or had relation to shipments to Greenwich for ultimate transportation to points without the State of Pennsylvania, due to the fact that the obligations of the plaintiff in error in respect to these shipments were those which had been devolved upon it by the Interstate Commerce Act, and that if these obligations had been disregarded, the remedy of the defendant in error was in the Federal tribunals only.

This contention, however, was overruled and the issue raised thereby is the only one which is presented by the Record in the present case.

SPECIFICATIONS OF ERROR.

1. The Supreme Court of Pennsylvania erred in overruling and dismissing the following assignment of error:

> "10. The Court below erred in overruling the following exception of the defendant to the Referee's supplemental report:
>
> "'1. The Referee has erred in finding that the plaintiff is entitled to recover $3,508.70, being ten cents a ton on 35,087 tons of coal shipped by it from its mines other than its Gallitzin mine after December 3, 1900.'"

2. The Supreme Court of Pennsylvania erred in overruling and dismissing the following assignment of error:

> "11. The Court below erred in overruling the following exception of the defendant to the Referee's supplemental report:
>
> "'2. The Referee has erred in finding that the plaintiff is entitled to recover $10,816.74, being 18 cents a ton on 60,093 tons of coal shipped by it from its Gallitzin mine between October 1, 1899, and May 1, 1901.'"

3. The Supreme Court of Pennsylvania erred in overruling and dismissing the following assignment of error:

> "14. The Court below erred in overruling the following exception of the defendant to the Referee's supplemental report:
>
> "'7. The Referee has erred in not finding and reporting that of the 35,087 tons of coal shipped by the plaintiff from its mines other than its Gallitzin mine after December 3, 1900, 13,917 tons had been shipped to Greenwich, and as it appears from the testimony that the plaintiff's shipments to Greenwich included interstate and intrastate shipments, and the plaintiff failed to show the division as between

the same, no recovery could be had as to any of the Greenwich shipments.'"

4. The Supreme Court of Pennsylvania erred in overruling and dismissing the following assignment of error:

"16. The Court below erred in overruling the following exception of the defendant to the Referee's supplemental report:

"'9. The Referee has erred in not finding and reporting that of the 44,579 tons of coal shipped by the plaintiff from its Gallitzin mine between October 1, 1899, and May 1, 1901, to points or destinations to which the defendant transported shipments for either the Altoona Coal & Coke Company, the Glen White Coal & Lumber Company or the Millwood Coal & Coke Company, 37,971 tons were shipped to Greenwich, and as it appears from the testimony that the plaintiff's shipments to Greenwich included interstate and intrastate shipments, and the plaintiff failed to show the division as between the same, no recovery could be had as to any of the Greenwich shipments.'"

ARGUMENT.

The payments which the defendant in error asserted were unlawful rebates and upon which it based its action are the same which were considered and dealt with by this Court in the case of the Mitchell Coal and Coke Company *vs.* Pennsylvania Railroad Company, 230 U. S., 247.

In that case the Coal Company sought to recover in respect to shipments made by it which were interstate in character, while in the present case recovery was sought in respect to what it claimed were its intrastate shipments.

The two cases were tried together before the same Referee, the testimony taken being entitled in both cases. In

the case involving the interstate shipments this Court determined that the payments of which the defendant in error here complains which had been made to the Latrobe Coal and Coke Company were unlawful, but that the payments to the Altoona Coal and Coke Company were lawful if not excessive in amount, considered with reference to the character and extent of the services for which they had been made. The Court declined to pass upon the question whether the payments were excessive, holding that that was a matter for the determination of the Interstate Commerce Commission.

In the present case the defendant in error has recovered the sum of $3508.70 because of the payments made to the Latrobe Coal and Coke Company, and $17,374.94, because of the payments made to the Altoona Coal and Coke Company, not because these were excessive in amount, but because in the view of the Supreme Court of Pennsylvania they were unlawful *in toto*.

The defendant in error wholly failed to establish and indeed offered no testimony tending to establish that any injury had resulted to it from any of the payments of which it complained, but insisted that, as a matter of law, it was entitled to recover the same amount per ton on its shipments which it asserted had been paid as rebates to the Latrobe and Altoona Companies. Its claim in this respect was sustained, and the damages recovered were ascertained and measured upon this basis, a basis which this Court in the case of the Pennsylvania Railroad Company *vs.* International Coal Mining Company, 230 U. S., 184, held was not warranted or justified in respect to shipments as to which the obligations to which the carrier and the shipper were subject were those imposed by the Interstate Commerce Act.

It would seem necessarily to follow, therefore, that if the defendant in error in the present case has recovered as to any shipments which were interstate in character, and as to which consequently the provisions and obligations of the Interstate Commerce Act were applicable, the judgment would have to be reversed even if the power of the Court

to deal with such shipments were to be conceded, because the judgment which the defendant in error has recovered was based upon the view adopted by the Court below that the plaintiff in error was not justified in making any payment to the Altoona Company, while this Court has held that a payment was justified, and upon the further view or consideration that the defendant in error was entitled to recover the amount of any rebates paid to another shipper without proof of any resultant injury to itself from such payments, while this Court has held in the International case, above referred to, that resultant injury must be shown, and that the amount of this resultant injury and not the amount of the rebate is the measure of the recovery.

But if there were interstate shipments embraced in those as to which a recovery has been had, the Court below, a State Court, lacked, we submit the jurisdiction or power to adjudicate the rights of the parties in respect thereto.

It was the contention of the plaintiff in error that a portion of the shipments as to which the defendant in error has recovered were interstate in character. The facts connected with these shipments were as follows:—

The shipments were carried by the plaintiff in error from the mines of the defendant in error in Pennsylvania to Greenwich, a tidewater shipping point within the limits of the city of Philadelphia. The rates of freight which applied to shipments to Greenwich were known and referred to as "tidewater rates," and in respect to these rates, Mr. J. G. Searles, the General Coal Freight Agent of the plaintiff in error, testified as follows:—

"By MR. GILFILLAN:

"Q. Just now I am talking about tidewater. Define what you mean by tidewater?

"A. We mean by tidewater coal shipped from the shipping piers at tidewater transferred into boats.

"Q. That means tidewater at any place?

"A. We only have three tidewater shipping points.

"Q. What are they?

"A. Baltimore, Philadelphia and South Amboy.

"Q. It is only to those three places that the phrase 'outside the Capes' is used?

"A. It only applies to Baltimore and Philadelphia." (Transcript of Record, page 21.)

And in respect to the general charcter of the rates prevailing to these tidewater points, Mr. Searles further testified as follows:—

"There are two rates on tidewater coal both to Baltimore and Philadelphia, one which applies on coal reshipped in the case of Philadelphia outside the Capes of the Delaware, and in the case of Baltimore, on coal shipped outside the Capes of the Chesapeake, but the other places (applies) on coal reshipped and delivered on water to points located on the water front within the Capes of the Delaware or the Chesapeake, as the case may be." (Transcript of Record, page 22.)

During the period in which the shipments were made as to which the defendant in error has recovered, there was a difference of fifteen cents per ton between "outside" and "inside" the Capes rates to Greenwich, the former rate being $1 per ton and the latter $1.15 per ton, and that the shipments to Greenwich and the rates charged thereon were treated or regarded by the defendant in error as parts of through shipments and through rates to the ultimate destination is apparent not only from the fact that its rates varied with respect to the ultimate destination of the coal, but from the rate orders which were promulgated or issued by it from time to time, some of which will be found at pages 24 and 25 of the Transcript of Record. By referring to these it will be seen that the rates to Greenwich are referred to as "the rail proportions of through rates on bituminous coal, shipped via Harsimus, South Amboy or Greenwich to points beyond."

We assume that it will hardly be disputed that if the final destination of the coal shipped to Greenwich and transported thence by water is the determining factor, the rail transportation of that coal which was thereafter transported

beyond the Delaware Capes must necessarily be regarded as interstate in character.

That the ultimate destination of the coal is the determining factor and that as a consequence the transportation of these shipments must be regarded as interstate in character is established, we submit, by the decision of this Court, in the case of Ohio Railroad Commission *vs.* Worthington, 225 U. S., 101. It appeared in that case that the Railroad Commission of Ohio had made an order prescribing the rates to be charged on coal shipped from a point in Ohio to a point on Lake Erie, also in Ohio, and the question before the Court was whether such shipments were intrastate shipments and consequently within the control of and subject to the regulatory power of the State Commission of Ohio.

It appeared that the service performed by the Railroad Company was completed when it delivered the coal in the vessel at the lake ports, and that its rates covered the transporation of the coal merely from the point of origin of the coal to the vessel's side, the entire haul being within the State of Ohio, and the question therefore for determination was whether the fact that the coal was thereafter transported beyond its rail destination to points outside the State of Ohio by another agency converted what would otherwise have been an intrastate into an interstate shipment.

This Court held that the shipment was interstate in character, and that consequently the Commission of Ohio was without authority to prescribe and enforce the rates which it had promulgated.

> "Was the Railroad Commission of Ohio," said Mr. Justice Day, delivering the opinion of the Court, "authorized to put in force the rate in question as to lake-cargo coal? It is not necessary to review the cases in this Court which have settled beyond peradventure that the National Government has exclusive authority to regulate interstate commerce under the Constitution of the United States; nor to do more than reaffirm the equally well-settled proposition that over interstate commerce transportation rates the State has

> no jurisdiction, and that an attempt to regulate such rates by the State or under its authority is void. * * * The question is, then, one of fact. Does the transportation which the rate prescribed by the Railroad Commission of Ohio covers, constitute interstate commerce?" (Page 107.)

Mr. Justice Day then proceeded to point out the facts which bore upon the character of the transportation and summarized the situation as follows:—

> "The situation then comes to this, that the rate put in force is applicable only to coal which is to be carried from the mine in Ohio to the lake, there placed upon vessels, and thence carried to upper lake ports beyond the State. By every fair test the transportation of this coal from the mine to the upper lake ports is an interstate carriage, intended by the parties to be such, and the rate fixed by the Commission which is in controversy here is applicable alone on coal which is thus, from the beginning to the end of its transportation, an interstate carriage, and such rate is intended to, and does, cover an integral part of that carriage, the transportation from the mine to the Lake Erie port, the placing upon the vessel, and the trimming or distributing in the hold, if required, so that the vessel may complete such interstate carriage."

Notwithstanding the fact, therefore, that the coal was transported by the railroad company under local bills of lading which showed the lake port in Ohio as the destination, and the further fact that the transportation beyond such lake ports was a matter that the railroad company was in no wise concerned with, as the shipper or consignee of the coal arranged for this and chartered or procured the vessels necessary for the purpose, it was held by this Court that the railroad rate of freight was nevertheless an interstate rate over which a State Commission had no control, and consequently an order of the lower Court which had enjoined the Commission from proceeding to make it effective was affirmed.

The Referee in the present case attempted to distinguish the case which he was dealing with from that to which we have just referred upon the ground that it appeared in that case that practically all of the coal that was carried to the lake port was transported thence by water to points outside of the State of Ohio, while in the present case the Greenwich shipments as a whole were not transported to points beyond the Capes of the Delaware.

If we were dealing with the rates to Greenwich generally and the question were whether they were altogether beyond the regulatory power of the State, there might be some force in the distinction to which the Referee called attention, but what we are concerned with in the present case is whether rates which were exclusively applicable to and concededly were charged for the carriage of coal which did go beyond the Capes of the Delaware were subject to Federal or State control.

The Referee seems to concede that if all the Greenwich shipments had moved to points beyond the Capes of the Delaware, the rates thereon would have been subject to Federal supervision and control, but does it not necessarily follow, if this be true, that the rates applicable to that portion of the Greenwich shipments which did go beyond the Capes were subject to Federal and not State control. If there is any distinction between the two cases, the present one would seem to be the stronger one so far as it relates to the question of Federal control, because in the Ohio Railroad Commission case the rates which were under consideration could have been used for purely local or intrastate shipments, while in the present case the rates with which we are concerned were only applicable to interstate shipments.

The Supreme Court of Pennsylvania declined to accept the ultimate destination of the coal as determining the character of either the shipment or the rates.

"The shipments to Greenwich, Philadelphia," said that Court, "were intrastate, and hence were properly included in this action. They were consigned to plaintiff at Greenwich, and there the contract of carriage between the plain-

tiff and the defendant was fully performed and ended. What disposition the plaintiff made of the shipments at Greenwich, whether it sold them or sent them within or beyond the State, is immaterial as affecting the question whether as between the plaintiff and defendant they were intrastate or interstate." (Transcript of Record, page 75.)

This view we submit is opposed not only to the decision of this Court to which we have already referred, but to numerous other decisions in which the rule has been established, to quote from the opinion of this Court in the Union Stock Yards case, 226 U. S., 304, "that the service is performed wholly in one State can make no difference if it is a part of interstate carriage."

Other cases in which this view has been adopted and acted upon by this Court are so recent that we should not be justified in doing more than merely to refer to them. They are:—

Texas & New Orleans Railroad Company *vs.* Sabine Tram Company, 227 U. S., 111.

Louisiana Railroad Commission *vs.* Texas & Pacific Railway Company, 229 U. S., 336.

If, then, the shipments to Greenwich which were ultimately transported to points beyond the Delaware Capes were interstate in character, the plaintiff's cause of action in respect thereto was not maintainable in a State Court.

In the Mitchell Coal and Coke Company case, 230 U. S., 247, this Court, dealing with the forum in which the cause of action asserted therein and herein in which the cause of action asserted therein and herein in respect to interstate shipments was maintainable, said:—

> "The plaintiff's cause of action for damages occasioned by the payment of the illegal or unreasonable allowances was one which under Sections 8 and 9 of the Commerce Act could only be brought in a District or Circuit Court of the United States."

F. D. McKENNEY,
FRANCIS I. GOWEN,
JOHN G. JOHNSON,
For Plaintiff in Error.

(23,922.)

SUPREME COURT OF THE UNITED STATES.

October Term, 1914. No. 287.

THE PENNSYLVANIA RAILROAD COMPANY,
Plaintiff in Error.

vs.

MITCHELL COAL AND COKE COMPANY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF PENNSYLVANIA.

BRIEF OF DEFENDANT IN ERROR.

COUNTER STATEMENT OF THE CASE.

The defendant in error from April 1, 1897, to May 1, 1901, was a large shipper of coal from the Clearfield region, in the State of Pennsylvania, to points both within and without the State of Pennsylvania. On March 1, 1905, it issued its writ against the Pennsylvania Railroad Company, covering shipments within the State of Pennsylvania, and on March 14th, 1905, it issued its writ covering shipments without the State of Pennsylvania. A statement of claim was filed in each case to which the

plaintiff in error pleaded "Not Guilty," and also the statute of limitations as to all shipments made prior to March 1, 1899. By written agreement of the parties both cases were referred to Hon. Theodore F. Jenkins, with all the powers of a Master in Chancery. Before the referee the shipments of tonnage were produced and the evidence given which showed the discrimination and the damage. The referee filed his report in both cases, finding in favor of the defendant in error: in the Federal case for $42,000, and in the State case for $80,513.90 actual damage, which he trebled, in accordance with the Act of Assembly of the State of Pennsylvania of June 4, 1883 (Pamphlet Laws, 72), making a total of $241,541.70. The Federal case, involving the interstate shipments is now in the Federal Courts awaiting determination, and is not involved in this proceeding. This proceeding is the State case involving the intrastate shipments, and was brought into this Court by error from the decision of the Supreme Court of the State of Pennsylvania. After the referee filed his report in the State case exceptions were filed by the plaintiff in error with the referee, and the referee upon consideration thereof modified some of his findings but dismissed most of the exceptions. His modifications, however, did not interfere with the amount of the judgment which he found, to wit, $241,541.70. Upon argument before the Court of Common Pleas No. 3, of Philadelphia County, an opinion was filed in which the Court said it would not disturb the referee's findings that the payments to the favored shippers were illegal rebates, but restricted the right of the defendant in error of recovery to certain of its shipments. and it also held that the bar of the statute of limitations was not tolled, and that defendant in error was not entitled to have treble damages. The Court referred back to the referee the report for further computation, in accordance with its opinion, and after a rehearing before the referee the referee found damages in the sum of $20,-

883.64, and also made an allowance for delay in payment at the rate of 6 per cent. from March 1, 1905, to the date of the rehearing, which amounted to $9,815.31, making a total of $30,698.95. Plaintiff in error filed exceptions with the referee, which were dismissed by the referee, and his report was filed in the Court of Common Pleas No. 3, awarding damages for $30,698.95. The plaintiff in error filed exceptions to the report as filed by the referee with the Court of Common Pleas No. 3 of Philadelphia County, and that Court, after hearing, dismissed all the exceptions except the one raising the question of the payment of $9,815.31 for delay, which exception it sustained, and ordered that judgment be rendered in favor of the defendant in error in the reduced sum of $20,883.64. Both defendant in error and plaintiff in error appealed to the Supreme Court of the State of Pennsylvania, which Court, after hearing on both appeals, dismissed both and wrote an opinion, and directed that the judgment of the lower Court for the sum of $20,883.64 be affirmed. The opinion of the Supreme Court of Pennsylvania will be found in the case of Mitchell Coal and Coke Company vs. The Pennsylvania Railroad Company, appellant, 241 Pennsylvania State Reports, page 536. Thereupon the plaintiff in error appealed to this Court on the ground that some of the shipments upon which an allowance had been made were interstate and not intrastate shipments. The total of the said shipments, which are known as the Greenwich shipments, amount to $7,087.35. The referee in computing the tonnage used 13,917 tons, which were shipped to Greenwich, Pa., as part of a larger tonnage upon which allowance was made at the rate of 10 cents per ton, and he also used 37,971 tons shipped to Greenwich, Pa., as part of a larger tonnage upon which an allowance was made of 15 cents per ton. (Page 64, Transcript of Record.) The plaintiff in error claims that there is some evidence (which defendant in error denies) that some of these

said Greenwich shipments went outside of the State of Pennsylvania, and that as the defendant in error has not differentiated and showed exactly what went outside and what went inside the State of Pennsylvania, there can be no recovery for this Greenwich tonnage, and that that tonnage should be over in the interstate case, and not in the intrastate case. As we understand it, there is no pretense by the plaintiff in error that the judgment of the Supreme Court of the State of Pennsylvania is not final, except as to the amount involved in these so-called Greenwich shipments, which amount to a total of $7,087.35 in the judgment of $20,883.64 affirmed by the State Supreme Court of Pennsylvania. There was no question raised from the time this case was started, March 1, 1905, until after November 4, 1912, and after the Court had recommended the report to the referee for a computation in accordance with the opinion of the Court of Common Pleas No. 3, that these Greenwich shipments were not correctly included in the State case. The first time it was raised was when the defendant in error and the plaintiff in error were agreeing upon the amount of tonnage shipped, in order to allow the referee to compute the damage in accordance with the opinion of the Court of Common Pleas No. 3 of Philadelphia County, and this was on December 23, 1912.

ARGUMENT.

As stated in the counter statement of the case, the only amount of money involved in this appeal is the sum of $7,087.35. There can be no question but that the balance of the judgment of $20,883.64 is a final judgment of a competent Court having jurisdiction of the matter, and this contention of the plaintiff in error as to the Greenwich shipments being interstate shipments, and, therefore, not within the jurisdiction of the State Courts of the Commonwealth of Pennsylvania to decide, has been raised, we feel, largely for the purpose of delay. The evidence shows that the Greenwich shipments were intrastate shipments, and were so regarded by both plaintiff in error and defendant in error, and the plaintiff in error does not even now contend that it has any proof that the tonnages referred to as Greenwich shipments were actually interstate shipments, but it says that as the evidence shows that some of these shipments were interstate shipments, and the defendant in error has not made the division, therefore it cannot recover for any of the tonnage. This so-called Greenwich tonnage was put in as intrastate tonnage in the State case when the case was first started and there were various negotiations and agreements as to tonnage between the plaintiff in error and the defendant in error during the progress of the hearing before the referee, which occupied more than three years. No suggestion was made by the plaintiff in error when it made its requests for findings of fact and of law before the referee after the testimony was in that the shipments were interstate. No reference was made to the Greenwich tonnage not being intrastate in character when the plaintiff in error filed its exceptions to the referee's report, after the referee had made his original report. No suggestion by the plaintiff in error that this tonnage was not intrastate tonnage even after the referee's report had been filed

in Court and the plaintiff in error had filed its exceptions in the said Court of Common Pleas No. 3 against the confirming of the referee's report. No suggestion by the plaintiff in error that the tonnage was not properly treated as intrastate tonnage on the hearing of the exceptions filed by the plaintiff in error with the Court of Common Pleas No. 3 of Philadelphia County against confirming the referee's report. Not until the Court of Common Pleas had sent the report back to the referee for correction in other particulars and the referee had called upon the counsel for the plaintiff in error and the defendant in error to agree as to the tonnage, was any question raised as to this so-called Greenwich tonnage not being properly intrastate tonnage. The plaintiff in error then made its argument before the referee at this stage of the case, against including the so-called Greenwich shipments as intrastate tonnage. The referee found against the plaintiff in error (page 67 Transcript of Record), where the referee uses this language:

> "The shipments to Greenwich were consigned to the plaintiff, so that the contract for carriage ceased when the coal was delivered there. The plaintiff might have sold the coal at that place. To have moved the coal from Greenwich a new contract for carriage would have been necessary."

After the referee had disposed of the contention of the plaintiff in error concerning these Greenwich shipments, and had filed his supplemental report, the plaintiff in error then raised the same question by exception before the Court of Common Pleas No. 3 of Philadelphia County, and that Court likewise overruled the contention of the plaintiff in error concerning the Greenwich shipments. Then the plaintiff in error appealed to the Supreme Court of the State of Pennsylvania, and that Court likewise ruled

against the plaintiff in error. Mitchell Coal and Coke Company vs. the Pennsylvania Railroad Company, 241 Pennsylvania State Reports, page 536. In the course of its opinion the Supreme Court of the State of Pennsylvania said:

> "The shipments to Greenwich, Philadelphia, were intrastate, and hence were properly included in this action. They were consigned to plaintiff at Greenwich, and there the contract of carriage between the plaintiff and the defendant was fully performed and ended. What disposition the plaintiff made of the shipments at Greenwich, whether it sold them or sent them within or beyond the State is immaterial as affecting the question whether as between the plaintiff and the defendant they were intrastate or interstate."

The plaintiff in error has now brought the question to this Court to decide.

Have all the tribunals that have passed on this question been wrong and the plaintiff in error been right, or has the plaintiff in error simply used this right of appeal to your Honorable Court to delay the payment of money honestly and justly due the defendant in error? We believe that delay has been the moving purpose of this appeal. Now let us look at the evidence:

J. G. Searles, the General Coal Freight Agent of the Pennsylvania Railroad during the period of the action, and the man who had charge of all coal shipments for the plaintiff in error, testified as follows (page 22, Transcript of Record):

> "A. There are two rates on tidewater coal both to Baltimore and Philadelphia, one which ap-

plies on coal RESHIPPED in the case of Philadelphia, outside the capes of Delaware, and in the case of Baltimore, on coal shipped outside the capes of the Chesapeake, but the other places, on coal reshipped and delivered on water to points located on the water front within the capes of the Delaware or the Chesapeake, as the case may be."

Mr. Searles further testified (page 23, Transcript of Record):

"Q. Baltimore came within the group of interstate as to which the Latrobe and Clearfield rates were made the same April 1, 1899?

A. Yes, sir.

Q. Into which group would shipments made to Greenwich for re-shipment come?

A. They would be considered as points within the State of Pennsylvania."

Mr. Mitchell, President of the defendant in error, testified (page 28, Transcript of Record) as follows:

"Q. In the statement of shipments made by your company to South Amboy and to Greenwich, are included, are there not, a number of shipments which were turned over by you after the arrival of the coal at Greenwich and South Amboy to other companies, upon terms which obligated them for the price of the coal at the mines, they paying the freight on that coal?

A. Yes, sir; in some cases. At that period the coal was weighed at South Amboy or Greenwhich, and the freight paid when the vessel was loaded, and we would very often be short coal and we would have to borrow from other people, and in some cases we sold and then they would pay

us back that amount of coal. There was usually a bill passed between us.

Q. Take for instance coal which you shipped to Greenwich and turned over under the circumstances referred to, to the Sterling Coal Company. Did you enter into any obligation at that time to take a similar amount of coal from the Sterling Coal Company?

A. In some cases when I would get it from the Sterling Coal Company I would agree to pay them back; whenever they needed the coal, they could call on us for it.

Q. In some cases?

A. YES; AND IN SOME CASES WE SOLD THE COAL OUTRIGHT. That statement there will show the whole thing on it. It shows all the coal we turned over and all we borrowed.

Q. And all you got from other parties?

A. All we got from other parties, so the difference in that would have to be checked off as f. o. b. mines coal.

Q. In point of fact, this statement shows that you turned over considerably more coal than you took from others?

A. Yes, sir; very often we would SELL SOME COAL OUTRIGHT that we had there."

In the Transcript of Record you will also find different rates for inside and outside the capes, and the tonnage that is directly involved in this case is found in the tables at page 62, Transcript of Record. These tabulations show the rate inside and outside the Delaware capes. The tabulation does not directly put the tonnage as going at either the inside or the outside rate, but every one agreed that the tonnage was to be considered intrastate, no matter at

which rate it was shipped. These very tabulations which the plaintiff in error relies on are headed:

"COAL
INTRASTATE."

The arrangement seemed to be this, so far as Greenwich is concerned, and that is the only place involved in this controversy: That all shipments made to Greenwich, whether for distribution around Greenwich point, which is in the State of Pennsylvania, or for intended reshipment thereafter, were considered intrastate shipments. That is what Mr. Searles, the man in charge of the freight rates for the plaintiff in error, testified to flatly, and the coal was consigned to the consignee at Greenwich, and the consignee could either lend the coal to other shippers, could reship it or sell it outright. The only evidence that the plaintiff in error has in this case to sustain its position is the mere fact that apparently some of the coal might have been shipped at the cheaper rate, known as the outside rate, which means outside the Delaware capes; but this did not make it an interstate shipment starting at the mines.

There is no evidence of any interstate shipment, but if some of the coal was shipped into other States, then the interstate shipment started with the reshipment at Greenwich, and not with the shipment from the mines. The evidence shows, and the referee and Courts which have heretofore passed on this question confirm that the shipment ended at Greenwich, and the man could do, and, as appears from the testimony, did do with the coal whatever he pleased. He got the lower rate if he said that hereafter he intended to reship the coal from Greenwich, but that intention might or might not be carried out when the coal reached Greenwich. Another thing to be observed is the fact that the outside or cheaper rate only applied when you

intended to ship it outside of the capes. According to the arrangement that the plaintiff in error then had in force, if a man shipped coal to Greenwich, Pa., he might either distribute it along the water front of Philadelphia or adjoining cities like Chester, Pa., or he might distribute it at Wilmington, Del., which last place would be outside of the State of Pennsylvania, and yet it would not be until the coal actually passed out of the capes of the Delaware that the shipment would come within the purview of outside shipments. So that the mere fact that the cheaper rate was secured, that is, that which is known as the outside rate, is not synonymous with interstate shipments, because as pointed out, a shipment to Wilmington, Delaware, if it started from the mines or started from Greenwich, would be an interstate shipment, and yet according to the rates and regulations in force it would be subjected to the high and inside rate, and not to the lower and cheaper outside rate.

There is no evidence that any shipment was at the lower or outside rate, but the plaintiff in error assumes that as we did not show that it was an inside rate therefore it must of necessity have been an outside rate, and an interstate shipment, simply because of that fact. The plaintiff in error should have objected to the tonnage at the time or have brought some evidence to show that the defendant in error was wrong in treating it as an intrastate shipment. The defendant in error was simply doing what the General Coal Freight Agent of the plaintiff in error said was the proper practice, to treat all shipments made to Greenwich, whether for reshipment or delivery, as intrastate shipments. It seems to us that there was the duty upon the Pennsylvania Railroad to show in fact that these were interstate shipments, if we were wrong in having proved them as intrastate shipments, and the mere reference to the rate would not be sufficient, even if it be admitted that the shipments were made under the lower outside rate,

because the outside rate did not begin to apply until you passed not only Pennsylvania but Delaware as well; and in addition to that it was the uniform practice, according to the testimony, to have the interstate journey begin at Greenwich, Pa., and not at the mines. Furthermore it should be made clear that this is not a question of conflicting control between a State body and an interstate body. There are no rules or regulations of either body involved in this case. It is simply the question of the treatment of certain tonnage. Suppose it were even admitted that it was an interstate shipment starting from the mines. Would there be any inhibition against the Railroad and the shippers for the purpose of estimating damage, agreeing that Greenwich should be treated as an intrastate point. Of course the parties could not change the rules and regulations of governing commissions, but is there any objection in the law to their agreeing to have their damages measured under a State rather than an interstate regulation, or vice versa, so long as it applied to all shippers? Happily we do not have to meet this question. As the evidence shows, the shipments that started at the mines ended at Greenwich; that the consignee at Greenwich could do what he liked with the coal, and that if a reshipment was made it was a new shipment, starting at Greenwich and terminating at some point in another State. The referee, who had all the testimony before him, found as a fact that this was an intrastate shipment. The Court of Common Pleas of Philadelphia County confirmed this finding of the referee, and in turn the Supreme Court of Pennsylvania confirmed the view of the Court of Common Pleas No. 3. Indeed the plaintiff in error apparently had this view from the date the suit was started, March 1, 1905, until December, 1912, when the referee was computing the tonnage at the time the report was recommitted to him for the purposes of calculation.

This case is different from those cases of which Texas and New Orleans R. R. vs. Sabine Tram Company, 227 U. S., 111, is an illustration. Greenwich Point is at the junction of the Schuylkill and Delaware rivers in Pennsylvania. The Delaware River separates New Jersey from Pennsylvania, and the Schuylkill river runs through the county of Philadelphia, separating what is known as Philadelphia proper from West Philadelphia. There are a great many industries along both sides of the Schuylkill river and along the western bank of the Delaware river, all of which are in Philadelphia. A great deal of coal is distributed along these points, which are known as the water points. There are also distributions made along the Delaware river lower down but still within the State of Pennsylvania, such as Chester and other points in Pennsylvania. Greenwich is not a place which is only an intermediary point either to an intersate or foreign shipment; it is what might be called a collection depot. That is, the coal is all shipped there and then distributed from that point, both along the water front in Philadelphia, along other cities and points on the water front in the State of Pennsylvania, along the water front in the State of Delaware and outside the capes to other States, and perhaps to foreign countries. Indeed there is no specific evidence as to what was done or how any of the coal involved in this case was shipped, except that it was shipped to Greenwich. Furthermore, the same character was given to all tonnage by both the carrying railroad and the shippers who received coal at Greenwich Point, viz.: that it was intrastate tonnage.

This is not a case where coal was shipped to a point, which coal in the ordinary course of business would generally go to a point in another State or to a foreign country. The general arrangement for the shipping of tonnage to Greenwich was quite the contrary, all parties concerned treating it as an intrastate journey from the mines to Greenwich, and then the reshipment from Greenwich to an outside

point being treated as the beginning of the interstate carriage. There was a new and independent contract that was made for the carriage of the coal from Greenwich to the Interstate point of destination. It was really not the interstate shipment from the mine, but the intention to reship to interstate points thereafter from Greenwich, that gave the shipper the right to get the lower freight rate. This may have been a loose arrangement on the part of the railroad company, but it certainly did not make the carriage interstate in character.

We feel that this writ has been lodged simply for the purpose of delay, and without any serious thought in the mind of the plaintiff in error that it was in any wise damaged or injured by the decision of the Supreme Court of the State of Pennsylvania. In view of these facts we ask the Court not only to affirm the judgment of the Supreme Court of the State of Pennsylvania, but also to allow damages at the rate of 10 per cent. in addition to legal rate of interest as provided by Rule 23 of the rules governing the practice in the United States Supreme Court.

Respectfully submitted,

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